



From

REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

FROM

MICHAELMAS TERM, 32 VIC., TO EASTER TERM, 32 VIC

BY

S. J. VAN KOUCHNET, M. A.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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JUDGES
OF THE
COURT OF COMMON PLEAS.

The Hon. WILLIAM BUELL RICHARDS, C.J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

Attorney-General:

Hon. JOHN SANDFIELD MACDONALD.

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REPORT OF CASES

IN THE

COURT OF COMMON PLEAS.

MICHAELMAS TERM, 32 VICTORIA, 1868.

On the first day of this Term, the Honorable John Hawkins Hagarty, senior Puisne Judge of the Court of Queen's Bench, took his seat as Chief Justice of this Court, in the place of the Honorable William Buell Richards, who was transferred to the Chief Justiceship of the Court of Queen's Bench, vacant by the resignation of the Honorable William Henry Draper, C.B., who was appointed to the Presidency of the Court of Error and Appeal.

On the same day, John Wellington Gwynne, Esq., Q.C., was sworn in as one of the Puisne Judges of this Court, in place of the Honorable Mr. Justice Adam Wilson, transferred to the Court of Queen's Bench.

Present :

THE HON. JOHN HAWKINS HAGARTY, C.J.

“ “ JOHN WILSON, J.

“ “ JOHN WELLINGTON GWYNNE, J.

REGINA v. ISAAC S. MORTON AND CHARLES E. THOMPSON.

Extradition—Prisoners discharged—Re-arrest by different magistrate—His right to issue warrant outside his own county, in Extradition Cases—29 Vic. ch. 51, sec. 373—28 Vic. ch. 20—31 Vic. ch. 17, s. 4, (Ontario)—Depositions taken in foreign country after arrest in Canada—Admissibility in evidence—31 Vic. ch. 94.

The prisoners were arrested at T., under a warrant issued by one M., on an information laid by B., charging them with robbery committed with violence in one of the United States of America, and stating the information to be laid before “the undersigned, Police Magistrate in and for the County of the City of Toronto, amongst other Counties, appointed under and by virtue of the Act of the Parliament of this Province, 28 Vic. ch. 20, entitled” &c., &c. The warrant of arrest described M. as Police Magistrate for all these Counties, naming them in full, and the warrant of commitment as Police Magistrate for the County of Essex, amongst other Counties, appointed under and by virtue of the above Act (but no commission empowering him to act was produced on this application, which was for the prisoners' discharge, under a writ of *habeas corpus*). Under this warrant the prisoners were conveyed to S. in the County of E., and evidence was given there before

M. of the robbery in question, consisting of certain depositions taken in the United States before a Justice of the Peace there, on which an original warrant of arrest was issued by him. These depositions had been taken and warrant issued after the arrest at T. On this evidence the prisoners were committed to custody to await the warrant of the Governor General for their extradition to the U. S.

The prisoners, it seemed, had been previously arrested at T. on the same charge, and been discharged by the local Police Magistrate after a lengthened investigation had before him.

Held, that this discharge did not prevent another duly qualified officer from entertaining the charge against them on the same or on fresh materials.

Held, also, that sec. 373 of 29 Vic. ch. 51, did not preclude M. from taking the information of B. and issuing his warrant in T., where there was already a Police Magistrate, for that the words of the section merely excluded him from jurisdiction there in local cases, but did not apply to cases arising under the Extradition laws.

Held, also, that the appointment of M. might well have been made under 28 Vic. ch. 20, for any one or for all the Counties of Upper Canada, including T., and his powers made the same as a Police Magistrate in cities, except as regarded purely municipal matters, and that this Act was continued by 31 Vic. ch. 17, sec. 4, (Ontario); but that as nothing was suggested in any way impugning the possession by M. of the authority to act, the ordinary rule must prevail and the warrant be treated as executed by an officer possessing such authority.

Held, also, that the depositions, on which the warrant issued in the U. S. after the arrest in Canada, were properly admitted here as evidence of criminality, their admission being within both the letter and spirit of the 31 Vic. ch. 94, (Can. Gaz. of August, 1868).

Remarks on the propriety of giving a liberal interpretation to the Extradition Treaty, and the inadequacy of its provisions to meet the class of felonies of most common occurrence in both countries.

A writ of *habeas corpus* was issued on 5th Nov., 1868, returnable in this Court, directing the keeper of the gaol of the County of Essex to bring up the bodies of Isaac S. Morton and Charles E. Thompson, &c., &c.

The bodies of the prisoners were accordingly produced in Court, together with the writ and the return thereto, which having been directed to be filed and read, the cause of detention was shewn to be a warrant, under the hand and seal of Gilbert McMicken, Police Magistrate for the County of Essex, dated 28th September, 1868, setting out that these prisoners were charged on the oath of George H. Bangs and others, with robbery, stated to have been committed with violence in the State of New York, in the United States of America; that they had fled to Canada, and that such evidence as would justify their apprehension and committal for trial, according to the laws

of Canada, had the crime been committed there, had been adduced before him; therefore, &c., they were committed to the Sandwich gaol, and the keeper commanded to receive and keep them till delivered by warrant of the Governor General ordering their extradition, &c., &c.

A writ of *certiorari* was also issued at the same time, under which the Police Magistrate returned that all the proceedings had before him had been returned to this Court. It appeared from these that an information had been laid before Mr. McMicken, on 28th September, 1868, at Toronto, by one George Henry Bangs, stating that he had been informed and believed that the prisoners had committed the robbery in question, about the 1st May last, in the State of New York; that they had made an assault on one Putnam W. Brown, a messenger of the Union Express Company, had feloniously put him in bodily fear and danger of his life, and stolen certain bonds and securities (describing them) of the value of \$20,000, the property of said Company, then in said Brown's custody, and against his will, &c., and that they had then fled to Canada, &c.

On this it appeared that Mr. McMicken, at the City of Toronto, on 28th September, 1868, had issued his warrant for their arrest, returnable before him at Sandwich, in the County of Essex, where, on the 7th October following, the prisoners appeared before him, and, on his proceeding to investigate the charge, application was made for further time to produce witnesses for the prosecution, and they were accordingly remanded.

On 15th October they appeared again, and a further remand took place to 20th October.

On that day they again appeared, and proof was given of the issue of an original warrant by Elisha Ferris, a Justice of the Peace at the Town of White Plains, Westchester County, State of New York, for the arrest of these prisoners and one Denman Thompson. A copy of the warrant was annexed to the proceedings and a professional gentleman proved the laying of the charge of robbery, according to the laws of New York; that he saw the com-

plaint made about the 10th October, and that he was the complainant; that the depositions of Stevens, Newman and Putnam W. Brown were taken before Mr. Ferris, and the warrant signed and delivered to an officer. The witness then knew that these prisoners were in Canada, but that the third, Denman Thompson, was at large.

The prisoner's counsel objected to reception of evidence of this warrant or of the depositions on which it issued, and at his request a further remand took place.

On 24th October the case was resumed, when several witnesses were examined proving the delivery to Brown, the Express Company's messenger, of a bag of securities, at Rochester, for New York.

The depositions taken before Mr. Ferris, the New York Magistrate, being proved, were received and read.

These depositions shewed very clearly that a robbery had been committed on the train. The Express man (Brown) proved that he was wakened from sleep, a pistol presented to his head, and that he was bound and gagged, while two men, whom he identified as these prisoners, (having seen them in Toronto on a former charge for this offence, before the Police Magistrate there, under whose warrant they had been arrested and subsequently by him discharged), forced open the safe and took the money and securities; that he was put in bodily fear, &c. There was other evidence of persons who saw the two men jump off the Express car that morning, as the train moved slowly into New York.

This evidence was considered sufficient by Mr. McMicken, and he accordingly committed the prisoners to the Sandwich gaol, on the warrant returned with the *habeas corpus*.

The other facts of the case appear from the several judgments delivered below.

The returns to the writs having been read, the prisoners were remanded until the following day, when O'Connor and McMichael appeared for them:—

The prisoners having been already arrested by warrant

of the Police Magistrate at Toronto, and discharged by him after investigation, were not liable to be re-arrested on the same charge without fresh evidence; for this would be unjust towards the prisoners and contrary to the spirit of the Treaty.

Mr. McMicken had no power to act in the case at all, for he had no jurisdiction in the City of Toronto, where he issued his warrant and arrested the prisoners: his authority was under the 28 Vic. ch. 20, which extended only for two years, and the Local Parliament had no power to continue the operation of this Act, as it purported to do by the 31 Vic. ch. 17, sec. 4. Besides, he is excluded from acting by the Municipal Institutions Act of 1866, sec. 373.

Then, the depositions taken in the United States after the arrest in Canada, ought not to have been used as criminating evidence against the prisoners. True, the ruling in the Martin case (4 U. C. L. J. N. S. 199) is opposed to this view, but it is submitted that this is not good law.

Again, the prisoners had no opportunity of cross-examining the witnesses whose depositions these were, which is opposed to the spirit and genius of the law, according to which the evidence should have been *viva voce*, so that the accused might have been face to face with their accusers. On all these grounds, therefore, the committal for extradition was illegal, and the prisoners should be discharged.

Prince, Q. C., and *Harrison*, Q. C., for the prosecution:—In the Reno-Anderson case* the decision of Chief Justice Draper fully sustains the authority of the committing magistrate. The Confederation Act provided that any legislation by the Parliament of the late Province of Canada, which required continuing, might be continued by the Legislatures of Ontario or Quebec; and the provisions of the 28 Vic. ch. 20, have been accordingly continued by the Ontario Act, 31 Vic. ch. 17, sec. 4.

* Since reported in 4 Can. L. J. N. S. 315.

The argument that the enquiry before the Toronto Police Magistrate was final fails, for he is a mere ministerial, not a judicial, officer.

Then, as to the depositions, the Statute does not say whether the evidence is to be documentary or oral; and the decision in the Martin case, already referred to, shews that depositions taken in the U. S., after proceedings commenced in Canada and arrest there, are admissible in evidence, and this decision must govern until reversed. They referred also to the Municipal Institutions Act of 1866, secs. 356, 360, 361, 367, 373; 6 & 7 Vic. ch. 76, sec. 2 (Eng.); *In Re Anderson*, 11 C. P. 53, 67; *Re Burley*, 1 U. C., L. J. N. S. 34; *In Re Bennett*, 11 L. T. N. S. 489; *In Re Coppin*, 2 Jur. N. S. 867; *Heinrich's Case*, Abbot's Nat. Dig. II. 512; *In re Kaine*, 14 How. 115.

John Patterson, on behalf of the Minister of Justice, referred to Hawk. P. C. ch. 35, sec. 6; 2 Hales P. C. 243.

HAGARTY, C. J.—The first objection raised before us was, that the prisoners had been already arrested by warrant of the Police Magistrate of Toronto, who had heard the charge and discharged the prisoners from custody, and that they were not liable to a second arrest for the same cause.

I hardly see how the record of these former proceedings is formally before us on the return to the *habeas corpus* and *certiorari*; but, assuming we are to take cognizance of them, I am of opinion that they cannot influence in any way our decision. The failure of any one Magistrate, from mistake or otherwise, to commit persons charged for extradition, cannot, in my opinion, prevent the action of another duly qualified officer from entertaining the charge on the same or on fresh materials: it is either a complete bar to any further proceeding or it is nothing.

Then, as to Mr. McMicken's authority to act. It is at first urged that he could not legally have taken Bang's information, or issued his warrant in the City of Toronto, where there was already a Police Magistrate, and sec. 373 of the Municipal Act of 1866 is relied on. It is there provided

that every Police Magistrate shall, *ex officio*, be a J. P. for the City or Town for which he holds office, as well as for the County or union of "Counties in which the City or Town is or was situate; but no other Justice of the Peace shall adjudicate, *in any case, for any Town or City where there is a Police Magistrate*, except in the "case of the illness, absence, or at the request of the "Police Magistrate."

The meaning of the clause would clearly seem to be, that in any case for any Town or City, that is, any case *arising in any Town or City*, no other J. P. should interfere. There might be obvious reasons for this restriction, applicable to local cases; but I am unable to see its application to cases under the Extradition laws.

Then, as to McMicken's general qualifications. We have had the advantage of perusing the carefully considered judgment of the learned President of the Court of Error and Appeal, when Chief Justice of the Queen's Bench, in the very late case of *Reno and Anderson*, on the construction and effect of the Statutes bearing on this office, and I fully agree with his conclusions. The appointment might well have been made under the 28 Vic. ch. 20, for any one or for all the Counties in Upper Canada, of course including the County of the City of Toronto; and his power would be the same as a Police Magistrate in Cities, except as regards offences against municipal By-laws, and as regards other purely municipal matters. I am also of opinion that I should hold this Act to have been continued by the 4th sec. of the Ontario Act of last session, (31 Vic. ch. 17), and the reasons, therefore, assigned by the late Chief Justice are satisfactory.

Mr. McMicken's commissions were produced before the Chief Justice, but not before us. On the other hand, nothing has been proved or suggested, on behalf of the prisoners, in any way impugning his possession of the authority on which he assumes to act, in the documents before us. In the absence, therefore, of any such impugnement, we must follow the ordinary course and treat the

warrants, &c., as executed by an official possessing the authority he professes to exercise.

In the information of Bangs, made in the City of Toronto, it is stated to be laid before "the undersigned Police Magistrate in and for the County of the City of Toronto, amongst other Counties, appointed under and by virtue of the Act of the Parliament of this Province, 28 Vic. ch. 20, intituled, &c., &c." In this warrant for arrest it is set forth at length that he is Police Magistrate for all these Counties, named in full, and the warrant of commitment sets out the charge before him as a Police Magistrate in and for the County of Essex, amongst other Counties, appointed under and by virtue of the Act 28 Vic. ch. 20, as above.

The reserved Act of last Session (31 Victoria, chap. 94) in *Canada Gazette* of 8th August, 1868, governs this case.

No question is made but that, under its provisions, the proceedings against a fugitive offender may be commenced in Canada, before any warrant or other proceeding has been issued in the United States. The case of *Reg. v. Burley* (1 U. C. L. J. N. S. 34) is express on this point.

Section 1 declares, in substance, that, on complaint made on oath, charging any person, found in Canada, with having committed, in the United States, any of the crimes mentioned in the treaty, it shall be lawful for any Judge, &c., "or any police magistrate, or any stipendiary magistrate in Canada," &c., &c., to issue his warrant for the apprehension of the person so charged, and on his being brought before him under such warrant, it shall be lawful for such Judge, &c., to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as, according to the laws of the Province in which he has been apprehended, would justify the apprehension and committal for trial of the person so accused, if the crime of which he is so accused had been committed therein, it shall be lawful for such Judge, &c., to commit, &c.

Section 2. "In every case of complaint, as aforesaid, and of a hearing upon the return of the warrant of arrest,

copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person or persons issuing such warrant, &c., attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

Section 7 repeals chap. 89 Consolidated Statutes of Canada and 24 Vic., chap. 6, except as to proceedings commenced under them before the passing of this Act.

In the Consolidated Statute the words are, "copies of the depositions, upon which an original warrant in any of the said United States may have been granted, certified, &c., &c."

In 24 Vic., chap. 6, (1861) the words are, "copies of the depositions upon which the original warrant may have been granted, &c., &c."

The Imperial Act, 6 & 7 Vic., chap. 76, provides for a requisition by the United States, under the Treaty, on the Secretary of State, for the person charged, before a warrant can be issued, and the words of section 2 are, "In every such case copies of the depositions upon which the original warrant was granted, certified, &c., &c., may be received in evidence, &c."

Under that Statute it was doubtless contemplated that the requisition would be accompanied by certain evidence of legal proceedings commenced in the United States, and a warrant would naturally be looked for.

In our Statutes it is recited that this provision which requires the warrant of the Executive Government, signifying the making of the requisition by the United States, had been found inconvenient in practice, "inasmuch as by the delay occasioned by compliance with the said provisions, an offender may have time afforded him for eluding pursuit."

The framer of the second section of our Statute most probably had in view the terms of the Imperial Act, under which the original warrant from the United States would naturally accompany the preliminary requisition.

Although the proceedings could be initiated in Canada, still, the extradition of the offender by the order of the Executive would not take place unless he were required by the United States, and he would then be delivered to some person authorized to receive him on behalf of the United States, to be tried for the crime of which he stood accused. In such case a warrant would naturally be looked for, setting forth the offence charged.

So, there would be in every case, at some earlier or later stage, before final extradition, a warrant issued in the United States.

The point pressed strongly for the prisoners is, that, as the warrant was issued in the United States after the prisoners were arrested in Canada, the depositions on which it issued could not be read here as evidence of criminality.

The object of the Treaty and Statutes was the laudable purpose of surrendering by each country to the other persons charged with certain specified crimes. The safeguard chiefly relied on was, that the evidence of criminality would be sufficient for committal for trial if the offence charged had been committed in the country of apprehension.

Provision is clearly made in certain cases for the admission of depositions instead of *viva voce* testimony.

It is urged that this admission should be narrowly watched, as trenching on personal liberty, or as violating the principle of bringing the accused face to face with his accuser; but, although such principle generally prevails in all cases before commitment for trial, it cannot be too strongly borne in mind that practically it is not violated in cases like that before us. All this country is asked to do is to send the prisoners to the place where they must be face to face with all the witnesses against them, on whose testimony they may or may not be committed for trial. They are not so committed on this side of the boundary line.

In the case of an offence against our own laws, a man may be arrested in Sandwich, on a warrant charging an

offence committed in Ottawa, and may be taken to the latter place on the written depositions of witnesses he has never seen. There he is confronted with them, and is committed for trial or discharged, as the case may be. So, these prisoners are sought to be taken to that place in the United States where their examination and possible commitment may take place.

It was properly foreseen that, to make the Treaty of practical benefit, the person charged might be arrested in Canada in the first instance. A murder might be committed in Buffalo and immediate pursuit made after the perpetrator, following his traces until he was found at some place in Canada. All this might be necessarily done before there was time to apply for and obtain a warrant where the crime was committed. A case might also occur where it would have been impossible to obtain a warrant against any named person, although a crime had been clearly committed; for example, where the murderer was unknown at the time, but was traced by the possession of property stolen from the murdered man, and until caught with the property could not be identified; in both these cases the apprehension in Canada might well precede the issue of the United States warrant.

I am of opinion that when the warrant is actually issued in the United States, the depositions on which it issued can be used under the Statute. To hold otherwise would at once render *vivâ voce* testimony alone admissible in all cases where the arrest in Canada preceded the United States warrant.

I think the admission of these depositions was within both the letter and the spirit of the Treaty and Statutes. To hold otherwise would be to add a new term to the 2nd section, and to read it thus, "In every case of complaint, as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions, upon which the original warrant was granted in the United States, certified, &c., &c., may be received in evidence, *provided such original warrant was issued prior to the granting of such*

warrant of arrest." As already noticed, the words in the Consolidated Statute of 1859 were, "copies of the depositions upon which an original warrant in any of the said United States may have been granted." These words would be still more clearly against the prisoner's argument. I hardly think the later Statute designed to narrow the cases in which depositions might be received.

We have nothing to do with any of the designs imputed to the prosecutors, as to substituting written for *vivâ voce* testimony, or the other insinuations made against their good faith : we have only to see that the law is substantially adhered to.

There may be the strongest reasons for allowing the depositions to be available in such a case. Witnesses may be in prison, in bad health, advanced in years, and unable to bear long journeys, &c., &c.

We have also had the advantage of referring to the judgment of Morrison, J., in *Reg. v. Martin* (4 U. C. L. J. N. S. 199) on this point.

I have always felt disposed to give the fairest and most liberal interpretation to the provisions of an arrangement like this Extradition Treaty, entered into by two nations professing a common civilization, with a thousand miles of conterminous boundary. They properly agree that their respective territories shall not be the asylum for those who commit crimes abhorrent to the laws of both communities. They agree to surrender, on demand, such persons, to be dealt with according to the laws they are said to have violated. I have neither the right nor the desire to doubt that, when surrendered, they will be legally and fairly dealt with. We are not asked here to pronounce on their guilt or to commit them for trial : all this is left to the foreign tribunal. We in effect only send them to be examined before the magistrate, who will decide if a case be made out for their commitment; just as we send an offender against our own laws to appear on a warrant granted on the testimony of witnesses he has never seen.

The present law of Extradition is unfortunately power-

less to reach the class of felonies most common in occurrence, to the vast injury of the peace and good order of both the countries interested; and the almost complete impunity enjoyed by fugitive criminals on either side of the lines is a matter of such dangerous significance as probably soon to force itself on the attention of both governments.

Willing to accord to the prisoners every substantial protection given by the law, which provides for their removal, I cannot accede to the arguments urged on their behalf, without violating its plain provisions and frittering it away in subtle distinctions.

I am of opinion, on the whole case, that a valid cause of detention has been shewn to this Court, and that the prisoners must be remanded to the custody of the keeper of the gaol of the County of Essex, on the warrant of commitment returned with the *habeas corpus* as the cause of detention.

J. WILSON, J.—The provisions of the Imperial Statute, 6 & 7 Vic., chap. 76, passed to give effect to the Extradition Treaty of 1842, were found inconvenient in Canada, in requiring that before the arrest of any offender within the provisions of the Treaty a warrant should issue under the hand and seal of the person administering the government, to signify that a requisition had been made by the authority of the United States for the delivery of the offender, and to require all justices of the peace, and other magistrates and officers of justice, to aid in apprehending the person accused, and committing him to gaol, to be delivered up to justice, according the provisions of the said Treaty. To remedy this, the 12th Vic. chap. 19, was passed. This Statute was consolidated by chap. 89 of the Consolidated Statutes of Canada, and both were superseded by the 24th Vic. chap. 6. To make this apply to the Dominion, the 31st Vic. chap. 94, was passed and became in force on the 8th of August last. The recital in this Act states the reason for the change, “inasmuch as by the delay occasioned by compliance” with the said provisions (in the

English Act) an offender may have time afforded him for eluding pursuit.

This Statute provides that, upon complaint made on oath before certain judicial officers, among others, a police or stipendiary magistrate, charging any person, found within the limits of Canada, with having committed, within the jurisdiction of the United States of America, any of the crimes enumerated in the Treaty, he is empowered to issue his warrant for the apprehension of the person so charged, that he may be brought before him, and, upon his being so brought, to examine upon oath any person touching the truth of such charge, and upon such evidence being given as, according to the laws of the Province in which he has been apprehended, would justify the apprehension and committal for trial of the person so accused, if the crime of which he is so accused had been committed therein, it shall be lawful for such magistrate to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until surrendered according to the stipulations of the Treaty, or until discharged according to law.

It also provides that, in every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

On a warrant issued at Toronto, on the 28th day of September, 1868, by Gilbert McMicken, a police magistrate, acting in all the counties of Ontario, returnable at Sandwich, in the County of Essex, these defendants were arrested, and taken to Sandwich, where their case was heard. At the hearing copies of proceedings were received in evidence, which had been taken at White Plains, in Westchester County, in the State of New York, before Elisha Ferris, Esquire, a magistrate there, on proof made on

oath that they were true copies of the original proceedings taken before him.

On this hearing, adjourned from time to time, the defendants were committed for extradition. They are here now on a writ of *habeas corpus*, and the proceedings are before us on a writ of *certiorari*.

The defendants ask to be discharged : 1st. because they had before been discharged by Alexander McNabb, Esquire, before whom they had been brought some time ago, charged with the same offence ; 2nd. because they suggest that Gilbert McMicken had no authority to act in Toronto and in Sandwich ; and 3rd. because the proceedings in the State of New York, before Mr. Ferris, were commenced after the arrest of the parties here, for the purpose of making copies of them evidence of their criminality, with a view to their committal for extradition. They say they ought not to be twice vexed with the same proceeding.

They were not tried and acquitted in the sense in which the maxim "*nemo bis vexari debet*" applies. They were discharged in the discretion of Mr. McNabb, a police magistrate, I assume, on grounds satisfactory to himself. We have his proceedings before us in an irregular manner, but, giving them their full weight, they are no bar or answer to the case before us any more than the dismissal of a charge by one magistrate would preclude another from investigating the same charge. They say that Mr. McMicken had no authority. We find him publicly exercising his functions as police magistrate in several counties in Ontario, and we cannot hear these defendants, on their mere suggestion, demand their discharge, because the Crown does not shew his authority and his commission. See on this point the case of *Reno and Anderson* before Draper, C. J. Lastly, they say that the copies of these proceedings in the United States were improperly received, and were not evidence in the matter.

I have referred to the difference between our Statute, to give effect to the Treaty, and the English one, and the reason for the difference, lest "the offender might have time for eluding pursuit."

Now, the course of procedure seems very plain. When complaint on oath is made before a Police Magistrate, &c., charging any person, found within the limits of Canada, with having committed, within the jurisdiction of the United States, any of the crimes enumerated in the Treaty, he is empowered to issue a warrant to bring the offender before him, and, when so brought, to examine upon oath any person touching the truth of the charge, and upon such evidence being given as, according to the laws of the Province in which he has been apprehended, would justify his committal for trial there, then to commit him for extradition; but, in every case of complaint, and of a hearing upon the return, copies of the depositions upon which the original warrant was granted in the United States, certified, &c., may be received in evidence of the criminality of the person so apprehended.

Suppose immediate pursuit were made on the commission of an offence in the United States coming within the Treaty, and the criminal were found in Canada; would it be contended, with any shew of reason, that the party making pursuit might not, after procuring the arrest of the offender, return where the offence had been committed, and there make complaint and have a warrant issued, then return to any Province of this Dominion, and say, "Here are copies of the depositions against this prisoner which I offer as evidence of his guilt, that he may be committed for extradition?"

But it was argued that these prisoners were not found on immediate pursuit, and the evidence on which they were arrested did not itself bring their case within the treaty, and the depositions taken in the United States were taken after their arrest and with the sole view of being used here. True: it may be so; but are they less within the Treaty, or the provisions of our Statute, to give it effect?

It is not denied that, if we read the depositions taken in the State of New York, these prisoners were guilty of robbery and are within the treaty.

The whole argument has been conducted, as it appeared

to me, under the erroneous impression that we were finally disposing of the guilt or innocence of these prisoners. We have no such authority and exercise no such power. We are bound to see that the commitment for extradition is warranted by the Statute, and that the offence is sustained by evidence which in our own Courts would, *primâ facie*, establish the crime charged. We are bound to carry into effect the Treaty in its most liberal spirit, and I must say that the American cases are much more to be followed than some others for which, if they commended themselves to our judgment, we would pay great respect.

I have never had occasion to hesitate for a moment in committing for extradition from any fear that the parties charged would not have a fair trial. We are not to overlook or forget for an instant that we are dealing with a highly civilized people, most tenacious of their liberty, whose laws are similar to our own, but administered with more of the Common Law technicality than we have thought it expedient to retain, by which many avenues are left open for criminals to escape, which we have closed.

In committing for extradition, we say nothing more than we say every day to our own people, who, having committed an offence in one county, are found in another: "Return, meet your accusers face to face, and answer the charges made against you: we confide in your having a fair trial."

For these reasons, I think, the prisoners should stand committed for extradition.

I have but to express a hope that the time will soon come when other offences may safely come within the provisions of a more liberal treaty. A terribly dense cloud has been swept away, under the dark shadow of which, it was felt, it would not be safe to surrender persons accused of larceny.

GWYNNE, J.—It is contended that the prisoners should be discharged from detention under the warrant of commitment of Mr. McMicken filed with the return to the

habeas corpus issued in this matter, upon three grounds :

1st, Because, as is alleged, the prisoners had been already brought up on the same charge before the Police Magistrate of the City of Toronto and discharged ; and in support of this objection it is contended that the Statute of this Dominion, passed to give effect to the Extradition Treaty, authorizes but one arrest upon the same charge.

2nd, That Mr. McMicken had no authority to act at all, the Act 28 Vic. ch. 20 having expired ; and that, at any rate, he had no jurisdiction to issue a warrant in the City of Toronto, where, as appears, he did issue his warrant for the arrest of the prisoners for the purpose of bringing them before him for enquiry and hearing.

3rd, Because, after the return of the warrant of arrest and after a remand, copies of depositions taken in the United States, subsequently to the arrest in this Province, upon which depositions a warrant was issued in the United States, were produced and received as evidence upon the hearing of the case before Mr. McMicken.

No authority was cited in support of the first objection, and I can see no foundation in reason or principle for the contention that the Statute, passed to give effect to the statutory provisions of this Treaty, should be so construed as to circumscribe the jurisdiction of the officers appointed to carry it into effect within narrower limits than the jurisdiction which every ordinary Justice of the Peace has over offences charged to have been committed within the County of which he is a Justice.

It never has been contended that the discharge of a person accused of a felony committed within this Province, when brought up before a Justice of the Peace for examination, whether such discharge should be attributable to the infirmity of the judgment of the Justice, or the insufficiency of the evidence adduced before him, operates as a bar to the same person being again brought up before another Justice and committed upon the same charge, upon the same or different evidence.

That a different rule in this respect should prevail in

cases arising under the Extradition Treaty from that which prevails in our own proceedings, in relation to criminal offences committed within the limits of the Province, is irreconcilable with the plainest principles of reason and justice, and for such a contention nothing which is expressed, or contained by implication in the Statute, affords, in my judgment, any warrant or foundation.

The judgment of the President of the Court of Error and Appeal, when Chief Justice, in the case of *Reno and Anderson*, lately before him, with which we have been furnished by the Reporter,* and in which I fully concur, disposes of the objection as to the authority of Mr. McMicken under the commission issued to him under 28 Vic. ch. 20; for, although we have not before us the commission itself, still, it does sufficiently appear in the proceedings brought under our notice that he was acting in virtue of a commission constituting him a Police Magistrate under that Act; indeed, the objection taken implies as much, for the objection is, that, as is contended, the Statute, which authorized the issuing of the commission, having expired, the authority of the commission has expired with it.

But it is further contended that, granting the continuing validity of the commission, still the provisions of secs. 356, 360, and 367 to 373, inclusive, of 29th and 30th Vic. ch. 51, have the effect of prohibiting and restraining Mr. McMicken, although acting under 28 Vic. ch. 20, from acting as a Police Magistrate in this matter within the city of Toronto, which has a Police Magistrate of its own.

This contention rests upon no solid foundation, and it involves, in my judgment, a misconception of the object and intention of the sections referred to, the plain import of which, as their language unequivocally conveys, is to establish certain local Courts, having limited criminal jurisdiction, and to define the respective jurisdictions of the Police Magistrate of a city situate within a county, and of the Justices of the Peace of that county, *in respect of offences committed within the city and county res-*

* 4 Can. L. J. N. S. 315.

pectively. This is the sole object of the sections referred to. They have no application whatever to proceedings under the Extradition Treaty, which relates to offences committed in a foreign country.

The validity of the third objection depends upon the construction to be put upon the Act now in force, to give effect to the Treaty, namely, the 31 Vic. ch. 94.

The first Act upon this subject, 12 Vic. ch. 19, (consolidated in the Statutes of Canada as ch. 89) provided that in *every* case of complaint *and* of a hearing, upon the return of the warrant of arrest, issued in this country, copies of the depositions, upon which *an* original warrant in *any* of the United States may have been granted, certified as in the Act is mentioned, may be received in evidence of the criminality of the person apprehended. The Act 24 Vic. ch. 6, which was passed to amend ch. 89, provided in like manner that, in *every* case of complaint and of a hearing, copies of the depositions, upon which *the* original warrant may have been granted in the United States, certified in like manner as required by the previous Act, may be received in evidence: the present Act, 31 Vic. ch. 94, adopts the phraseology of the latter Act.

The Legislature did not, in my opinion, by the difference of phraseology, involved in the use of the definite instead of the indefinite article, in context with the word "original warrant," intend to point to any different warrant in the later Acts from that referred to in the prior one. These clauses in our later Acts would seem to have been copied from the Imperial Act, and it is this (probably accidental circumstance) which has, as I apprehend, given occasion for the argument which has been addressed to us on behalf of the prisoners; but it must be borne in mind that it is the plain intent of the Imperial Act that proceedings originating in the foreign country shall constitute the basis for proceedings being taken thereon in Great Britain; while, on the contrary, it is equally plain, and has been so held to be, that the preamble of all our Acts expressly declares that the inconvenience of such a practice in this

country (between which and the United States there is such facility of intercommunication, and such opportunity for fugitive felons to evade pursuit) necessitated a total change in the terms of our Act in this particular ; indeed, without such a change, the remedy contemplated by the Treaty would in this country be purely illusory. While, then, it may be conceded that these same words, would, in the English Courts, under the Imperial Act, receive the construction contended for here upon the behalf of the prisoners, we must give them a different construction when reading them in connection with the manifest intention of the Legislature expressed in the preamble of our Acts.

It has already been decided in our Courts, by decisions which have not been, and, as I understand the argument in this case, are not now impugned, that the process for the arrest of fugitive felons may *originate* in a warrant issued in this country, although no formal charge has yet been made in the United States ; but it is urged that in *such case vivâ voce* testimony only is admissible, whereas it is admitted that, if a charge be made and a warrant be issued in the United States before proceedings are taken here, then copies of the depositions taken abroad may be read. Such a distinction is referable to no principle that I can perceive or appreciate. I can see no reason why copies of depositions should be admitted in the one case, and be inadmissible in the other ; and I am bound to say that, in my judgment, there is nothing in the Act which would justify me in holding that the Legislature ever contemplated any such distinction. There is nothing in the Act which indicates an intention to provide two different modes of proof, the admissibility of which should depend upon a point so immaterial to the merits of the investigation as the place where the first proceeding to arrest the fugitive should be taken.

That the depositions, copies of which were used in this case, constituted the foundation of the warrant issued in the State of New York, which was produced in evidence, cannot be questioned. These depositions are surely original depositions in the country in which they were made, and.

the warrant issued upon them is surely regarded there as an original warrant : it is in fact the only original warrant granted in the United States in respect of the particular charge which these depositions make. Assuming, for the sake of argument, that there might have been two warrants against these prisoners, founded upon different depositions, made by different deponents, issued by different magistrates, having different local jurisdiction, I cannot see that the one is not as much an original warrant as the other ; and when one comes to be used in this country it is the original warrant in virtue of which the extradition of the accused is intended to be demanded, and which constitutes the original warrant in the proceedings instituted to bring him to judgment. If, then, this warrant, as I cannot doubt it to be, is the original warrant issued in the United States for the purpose of initiating the proceedings intended to be prosecuted to judgment there, we cannot be justified in ascribing to it a different character here. The depositions upon which such original writ issued are those, the copies of which, in my judgment, may be used. It is in this sense that we are to construe the section referred to in our Act, instead of reading it, as is contended, with the view of ascertaining, in each case, whether the warrant from abroad, which may be produced, is prior or posterior in point of time to that issued in this country, or prior or posterior to some other warrant not produced, which may have been issued in the United States against the same parties for the same offence, and in virtue of which the extradition is not intended to be, and perhaps could not be, demanded, by reason of some defect or erroneous description of the offence. As, for example, if the word murder should be left out in a warrant, and, to supply that defect, new depositions should be taken and a new warrant issued rectifying the error ; or, if the common law crime of robbery should be described in a warrant as "robbery" of certain money from a body corporate, which has no physical existence, and to correct this defect new depositions should be taken clearly disclosing the technical crime of robbery from a person, and a new

warrant issued thereon; in both of those cases, according to the contention on behalf of the prisoners, it is the defective warrant and the defective depositions the magistrate in this country would have to call for, to the exclusion of those correctly stating the offence, to stand their trial for which the proceedings for extradition of the prisoners were taken. All that in my judgment the Statute contemplates is, that copies of such depositions as are in the United States deemed to be sufficient to justify the issuing a warrant thereupon against the accused, for the purpose of bringing him to trial there and prosecuting it to judgment upon the same charge as that for which he is brought up in this country, if the offence charged be one within the treaty, may, *either* upon the complaint *or* upon the hearing, when duly certified by the person who issues the warrant, be received in evidence against the accused, without any regard to the time when the depositions may have been taken or the warrant have been issued in the United States. By such a construction we do, as is our duty, advance the remedy contemplated by the Act and give it effect, instead of frustrating its intent. I am of opinion, therefore, that the documents produced before us sufficiently establish Mr. McMicken's authority to act, and that the evidence shews such a case as leaves no course open to us, in the discharge of our duty, but to order the prisoners to be remanded.

Judgment accordingly.

CAMPBELL ET AL. V. LEPAN ET AL.

Replevin—Justification as receiver appointed by Court of Chancery—Pleading.

Replevin.

Defendants made cognizance and alleged that under a decree of the Court of Chancery, in a cause in which defendant Lepan was plaintiff, and one Vanderbeck was defendant, defendant Armour was appointed receiver of the partnership property of the late firm of Lepan & Vanderbeck, who "were the parties to the said suit in Chancery, and Armour, as receiver, and Lepan, as his servant and by his command, took and detained the timber in the declaration mentioned, *as and being* a portion of the said partnership property, which, &c." *Held*, on demurrer, bad.

This was an action of replevin, wherein the plaintiffs complained that the defendants took goods, chattels, and personal property of the plaintiffs', to wit, twenty-eight pieces of square oak timber, marked with the mark C. O., being the mark of the plaintiffs', and unjustly detained them against sureties and pledges, until, &c.

The defendants made cognizance and said, "that under and by virtue of a decree of the Court of the Chancery for Upper Canada, made in a cause wherein Charles Lepad was plaintiff and Egan Vanderbeck was defendant, the defendant Armour was duly appointed to the office of receiver of the partnership property of the then late firm of Lepad & Venderbeck, the persons constituting which firm were the parties to the said suit in the said Court of Chancery, and the defendant Armour, as such receiver, and the defendant Lepad, as his servant, and by his command, took and detained the timber in the declaration mentioned, *as and being* a portion of the said partnership property which are the grievances complained of."

To this cognizance the plaintiffs demurred upon the ground that it did not deny the plaintiffs' property in the goods, and was neither pleaded by way of traverse nor of confession and avoidance.

The case was wholly argued upon the effect of the words "as and being" in the cognizance, *O'Connor*, for the plaintiffs, contending that these words contained no allegation that the timber was the property of the partnership, of which the defendant Armour was said to be receiver, *Albert Prince*, Q. C., on the contrary, for the defendants, contending that in substance the word "being" did involve such allegation.

The following authorities were referred to: *Anderson v. McEwan*, 8 C. P. 532; *Stephen* Pl. 190, 191.

GWYNNE, J., delivered the judgment of the Court.

It appears to me that this case must be decided upon a more substantial point than that which was argued before us. This action not being for a distress, but for a

wrongful taking and detention, under 22 Vic. chap. 29, Consolidated Statutes of U. C., the defendants must plead such a defence as would be a legal defence to an action of trespass for the taking, or detinue for the detention: *Stephens v. Cousins* (16 U. C. 329), and 22 Vic. ch. 29, sec. 15.

The defendants' cognizance must therefore be tried by the tests applicable to a plea to the act of trespass complained of. The defendants, if the facts warranted the defence, might justify the acts complained of, by averring the ownership of the property in Armour, and that he, as owner, and Lepad, as his servant, and by his command, committed the acts. In such case the short simple form of the plea would be, "that the said goods were the goods of the defendant Armour, and not of the plaintiffs', as alleged, and that he, as owner, and Lepad, as his servant, and by his command, committed the alleged grievances; but this pleading does not set up such a justification, for Mr. Prince's whole argument was that the words "as and *being*" involved a sufficient averment that the goods were the property of the partnership firm of Lepad & Vanderbeck. Admitting, then, for the sake of argument, this to be so, then arises the question, is the pleading good as a justification by the authority and command of the alleged owners. It can only be so as to Armour, and by treating the allegation of his appointment by the Court of Chancery to the office of receiver of the partnership property as an averment which operates as a command to him given by the firm, the alleged owners of the property; but if that had been the intention of the pleader, it should have been directly pleaded as a command by the firm to Armour, who, as their servant, acted in the premises. But that this is not the intention or effect of the cognizance appears from this, that it removes the justification professed to be offered for Lepad; for he is alleged to have acted as the servant of, and by the command of Armour, himself only, by the assumption, a servant of the alleged owners of the property. If a servant of the true owners, who justifies in

obedience to their command, finds it necessary to employ the services of another under himself, the proper way, as it appears to me, for both to justify is, as the servant of, and by the command of, the true owners, and not the one as the servant of, and by the command of, the other. Whether we regard this cognizance, then, as a justification by Armour, as the true owner, which the cognizance shews that he is not, and by Lepad, as his servant, and by his command, or by Armour, under the authority and command of the firm alleged to be the true owners, and as their servant, and by Lepad, as his servant, and by his command, which is not the allegation, the cognizance is, in my opinion, bad, and judgment must be for the plaintiffs on the demurrer.

It appears to me that the cognizance is based upon a misconception of the office and powers of a receiver in Chancery: the order appointing a receiver does not transfer the ownership in the property, over which he is a receiver, to him. In the case of leasehold property it is not as owner of the reversion that a receiver exercises the right of distress: the order appointing him receiver directs the tenants to attorn to him, and upon attornment it is held that the relationship of landlord and tenant is created by estoppel between him and the tenants, in virtue of which he distrains: *Evans v. Mathias* (26 L. J. Q. B. 309); *Jolly v. Arbuthnot* (4 DeG. & J. 224).

When a receiver is appointed over partnership property, the order appointing him directs all parties to the suit to deliver over to the receiver all property, &c., &c., of the firm, in their respective hands: *Bennett's Office of Receiver*, Appx. 219; and if, upon demand, they neglect or refuse to do so, obedience is enforced by process of contempt: 2 *Daniel's Chy. Prac.* 1578; but the Court exercises no such jurisdiction over strangers, who are in possession of property, claiming it to be their own, but which may be supposed to be the property of the partnership. Once the receiver is in possession of property as the property of the firm, his possession is deemed to be the possession of the Court, and the Court of Chancery will not permit

adverse claimants, without its permission, to disturb the possession of the receiver, even by an action at law. It requires the claimant to petition the Court to be examined *pro interesse suo*, and directs an action at law or adjudicates itself as may seem best: *Angel v. Smith* (9 Ves. 335). For the collection of the debts and assets of the firm the receiver can bring actions only with the approbation of the Master, and in the name of the firm, whom the order appointing him provides that he shall indemnify: see *Bennett's Office of Receiver, supra*. The Court of Chancery, I am sure, sanctions no such idea as that a person, who is an officer of the Court for the mere purpose of receiver, shall, under the sanction of the Court, constitute himself, *ex mero suo motu*, the taker from the hands of strangers of property which they claim to be their own, but which he professes to think the property of the firm of whose assets he is the receiver. If such a principle is contended for in a Court of law it will be necessary for the parties asserting it to raise the point by pleading in a more precise manner than is done in this cognizance, which I think shews no sufficient justification in law for the acts complained of derived from the persons whom the cognizance intends to set up as the true owners.

Judgment for plaintiffs on demurrer.

KAATZ V. WHITE ET AL.

Lease—Unsigned memorandum indorsed on—Construction of—Way-going crops.

Plaintiff, by deed, leased from one S. certain land for five years from 1st October, 1862, agreeing thereby to give up possession on the expiration of the term created. On the lease was indorsed an unsigned memorandum to the effect, that if plaintiff cleared any more land than was then cleared he was to have the same rent free, for the first three years, for clearing and fencing the same. No land was cleared by plaintiff until the fall of 1865, and in the fall of 1867 he put in a crop of wheat. After the expiration of his term under the lease he asked permission from S. to remain on the premises until the latter wanted them, and in the following April he left of his own accord, giving up to S. the place with all that was on it. In the June following S., by deed, leased the land and crops thereon to two of the defendants for five years from the 7th of January previously, and subsequently to this, when the wheat had ripened plaintiff entered upon the land, then in defendant's possession under S., and cut the crop. After adjudication of a complaint as for a trespass, made before a magistrate, defendants took possession of the wheat, which was in shocks on the land, and plaintiff then sued them in this action, in trover:

Held, that the memorandum, not being by deed, could not operate as a lease for three years, because it was intended to commence from a time future, viz: from the clearing of the land, and that, therefore, unless it was taken as part of the lease, which was the most favourable construction for plaintiff, it was void under the Statute of Frauds; but that, taking it as part of the lease, it must be construed as coextensive only with the lease, and not as extending its duration beyond 1st October, 1867.

Held, also, that the memorandum could not operate so as to transfer to plaintiff the right of entering in 1868 on the possession of defendants and taking the crops in the ground, the property in which had passed to them under the lease from S., and which, moreover, the evidence shewed plaintiff had before this expressly surrendered with the land to S.; nor, on the authority of *Burrowes v. Cairns et al.*, 2 U. C. 288, could the plaintiff claim, as an outgoing tenant, the wheat, as a way-going crop, and that he was not, therefore, entitled to recover against defendants.

APPEAL from the County Court of the County of Oxford.

The plaintiff declared against the defendants for taking and converting to their own use 150 bushels of wheat of the plaintiffs.

The defendants pleaded, not guilty, and that the wheat was not the plaintiff's property.

At the trial it appeared, by the plaintiff's evidence, that the land, upon which the wheat had grown, was the property of one Sylvester, which the plaintiff had occupied as

his tenant for some years, and that the plaintiff had given up possession of the land in April, 1868. One Christian Gould, being called by the plaintiff, testified "that the plaintiff was living on the place when the wheat was sown; that he left it last Spring (1868); that the plaintiff agreed with Mr. Sylvester, about five years ago, that he was to clear land, as much as he liked, and to have three crops for anything he cleared; that he should have his three crops even if the term as to the old ground had expired. On cross-examination he said, "I do not recollect that there was a written lease: I expect the lease expired last October: it was one bargain." Being re-examined he said, "Sylvester said he had a lease made out for another man. I think the plaintiff signed it, and then the agreement as to the clearing was made." Being cross-examined on this examination he said, "I believe there was a written lease signed. I think the plaintiff signed a writing in my house. I do not know whether I signed my name or not." A witness was then called to prove that the plaintiff cleared the land two or three years ago this fall (1868): that he had got but two crops out of it, and that last fall he sowed the wheat. It further appeared that when the wheat was ripe the plaintiff entered on the land, then in the possession of the defendants, as tenants of Sylvester, whereupon there was a complaint laid before a magistrate for trespass against the plaintiff, for his entering and cutting the wheat, and after the adjudication in that case by the magistrate the defendants took the wheat, which was in shocks on the land, and this was the trespass complained of. The above contains the substance of the evidence offered to establish the plaintiff's title to the wheat. At the close of the plaintiff's case a nonsuit was moved for, upon the ground that there was no evidence that either the land or the crops in question were the property of the plaintiff, and that the verbal bargain spoken of was void under the Statute of Frauds, and conferred on the plaintiff no interest in the wheat. The judge reserved leave to enter a nonsuit, and the case proceeded. Sylvester was called for the defence, and he

produced a lease, executed in 1862, whereby he demised to the plaintiff by deed the north-east quarter of lot 24, in the 6th concession of the Township of Blenheim, for a term of five years from the 1st day of October, 1862. The lease was also executed by the plaintiff, and it contained a condition that the plaintiff was to quit the premises on the 1st day of October, 1867, and to leave them in good condition, reasonable wear excepted.

On the back of this lease was indorsed a memorandum, in whose hand-writing did not appear by the evidence : it was not signed by any one, and was as follows :

“ If the said John Kaatz clears any more land than is now cleared on the said lot, he is to have the same, rent free for the first three years, for clearing and fencing the same.”

He also produced a lease under seal, bearing date the 1st day of June, 1868, whereby he demised the same premises, with all buildings, trees and *crops* thereon, to two of the defendants for the term of five years, computed from the 7th day of January, 1868.

On his examination Sylvester said : “ The memorandum on the back of the lease to plaintiff was agreed to at the same time as the lease. It was under this agreement, and on no other terms, that the plaintiff held this land up to the 1st of October last. The verbal understanding was that it was to be cleared in 1862 and 1863. It was to be finished in 1863, so that I could get the share of the crop the last year (the rent reserved being half the crops). Plaintiff had a sale on the 1st of November, after his time was out, of his stock. He asked my permission to sell the straw and my share of it. He said he was going away and it would not be safe there. The wheat was in the ground then. Afterwards he asked me if I would make him some allowance for the wheat he had put in. He asked to be allowed to remain until I wanted the premises. In April he left of his own accord, and I went out to see him and he said he gave up the place, and I said, ‘ and all that is on it.’ He said ‘ yes, and all that is on it.’ Cattle were running all

over the place and on the wheat at the time. He said, 'you must look to your fences and put them up.' He said he could not be bothered with the fences."

The learned Judge of the County Court told the jury that the memorandum endorsed on the lease to the plaintiff might be read as if embodied in it, and there being a stipulation in the lease that the plaintiff should give up possession of the premises on the 1st of October, 1867, and having in fact given them up to his landlord in the month of April following, he had debarred himself from all right to the growing crops, and could not now sustain his claim to them, whatever the verbal agreement might have been as to the time when the land was to be cleared and the crops taken off. The jury, however, rendered a verdict for the plaintiff.

In the following term a rule *nisi* to enter a nonsuit, pursuant to leave reserved, was obtained, and, upon argument, made absolute; and against this rule the plaintiff appealed and insisted, as his grounds of appeal, that it should not have been made absolute, and that the verdict should not have been disturbed, "because the wheat in question was grown on land not cleared at the time of the lease to the plaintiff; that it was cleared in the fall of 1865, and that the wheat in question was the third crop on that land; that the effect of the memorandum on the lease in Sylvester's handwriting, coupled with the possession of the lessee, was to give the lessee a term of three years from clearing of the land not cleared at the date of the lease; but, at all events, it operated as a license to the plaintiff to enter upon the land, and cut the wheat, though the lease had expired; and that the memorandum endorsed on the lease, being in one view uncertain as to the tenancy created, the tenant had the right to the way-growing crop.

J. A. Boyd, for the appeal, cited *Birch v. Wright*, 1 T. R. 373; *White v. Nelson*, 10 C. P. 158; *Crosby v. Wadsworth*, 6 Ea. 602; *Wood v. Lake*, Say. 3; *Taylor v. Waters*, 7 Taunt. 374; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Malpas*

v. *London and S. W. R. Co.*, L. R., 1 C. P. 336; *Noble v. Spencer*, 27 U. C. 210, 214.

Harrison, Q. C., contra, cited *Koster v. Holden*, 17 C. P. 139; *Johnstone v. Cowan*, 25 U. C. 470; C. S. U. C. ch. 90, sec 4; *Hurley v. McDonell*, 11 U. C. 208; *Earl of Falmouth v. Thomas*, 1 C. & M. 89.

GWYNNE, J., delivered the judgment of the Court.

It seems very clear that the plaintiff, when his case had closed, had shewn no title to the wheat in himself, nor had he offered any evidence to warrant a verdict being rendered in his favour: the evidence, upon which his right, if any there be, to maintain the verdict, is based, came out in the defendants' case, and the question is, does that evidence in any way sustain the plaintiff's case?

The most favourable view to take of the plaintiff's case is, to regard the memorandum endorsed on the lease to the plaintiff, as the Judge of the County Court did, as a part of the lease; for if it does not form part of the lease, it cannot in itself, not being by deed, operate, as is contended, as a lease for three years, to commence at a future time, namely, from the clearing of the land. The terms contained in the memorandum exclude it from the operation of the exception in the second section of the Statute of Frauds. Unless, then, the memorandum be taken as part of the lease, it is void under that Statute, not being signed, and if signed, also void now, not being by deed. Whatever effect, if signed, it might have as an agreement, upon the authority of *Tidey v. Mollett* (10 Jur. N. S. 801) and *Tress v. Savage* (4 El. & Bl. 36), as between Sylvester and the plaintiff, regarding it as not forming part of the lease, it could not in 1862 have passed to the plaintiff property in wheat not grown until 1868.

But it was contended before us, although there is no appearance of its having been urged before the Court below, that it operated as a license from Sylvester to the plaintiff to take the crop, the property in which the plaintiff in this action claims to be his. As a mere license it

could not pass to the licensee property in goods not then in existence, and which could only come into existence by reason of an interest in the land passing upon its being cleared. Such license could not be created otherwise than by deed. The case of *Taylor v. Waters*, which was cited by Mr. Boyd, is overruled by *Wood v. Leadbeater*, 13 M. & W. 838. I think it clear, therefore, that it never could have, as contended, the operation of transferring to the plaintiff the right of entering, in 1868, on the possession of the defendants, who were Sylvester's tenants, and to take crops in the ground, the property in which had passed to them by the lease of the first day of June, 1868, which instrument must be taken to operate as a revocation of the license, if any had been granted by parol.

Taking the memorandum, then, as part of the lease, it must be construed as coëxtensive only with the lease, and all benefit under it must terminate with the term granted thereby. As a clause in the lease it cannot be construed as creating a new term in the land, which might be cleared, or as extending the duration of the term in the lease beyond the 1st October, 1867. But the plaintiff, in April, 1868, surrendered up possession of the premises, and, as Sylvester's evidence shews, all pretence of claim to the crops then in the ground. The legal estate, then, in the land, and in the crops growing thereon, was in Sylvester, and passed to the defendants, his tenants, by the lease of the 1st June, 1868.

Burrowes v. Cairns et al. (2 U. C. 288) is conclusive that the plaintiff could make no claim, as an out-going tenant, to the wheat as a way-going crop.

There appears, then, nothing in the evidence brought out on the defence which in any respect supplied the defects in the plaintiff's case at its close, but quite the contrary, and the propriety of the nonsuit upon the whole case, had the motion been renewed at the close of the defence, does not appear to admit of a doubt.

Appeal dismissed, with costs.

BRADY V. ARNOLD.

Trover—Tenants in common—Statute of Frauds—Payment by allowance on note—Conversion.

H., by agreement with defendant, planted $16\frac{1}{2}$ acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work and that defendant was to receive for his share as much Indian corn as should represent the portion of the land sown with sugar-corn and potatoes, and one-third of the Indian corn, and that H. was to have the remainder.

Subsequently H., being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own and harvested it :

Held, 1st. That plaintiff could not sustain an action against defendant upon a count in trespass to his (plaintiff's) land.

2nd. That H. and defendant were tenants in common of the crop of Indian corn.

3rd. That one tenant in common cannot maintain an action of trespass or trover against his co-tenant for the mere act of his reaping and harvesting the crop ; but he may do so, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it.

4th. That, on the finding of the jury in this case, the plaintiff must be taken to have paid the full price of the crop at the time of the bargain for its purchase, and the delivery being as complete as the circumstances would admit of, H.'s interest passed at that time to the plaintiff and could not be divested by the subsequent sale to defendant.

5th. That under the circumstances of the case the Court might assume after verdict, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion.

The declaration contained four counts :

1st. Trespass for breaking and entering the plaintiff's land.

2nd. Conversion of the plaintiff's goods ; that is to say, the produce of $16\frac{1}{2}$ acres of Indian corn in shock.

3rd. Injuring and taking the plaintiff's goods ; that is to say, Indian corn.

4th. Money received to the plaintiff's use.

Pleas. To the 1st, 2nd and 3rd counts, not guilty.

2nd. To the first count, that the lands were not the plaintiff's, as alleged.

3rd. That the lands, at the time of the alleged trespass, were the soil and freehold of the defendant.

4th. As to the 2nd and 3rd counts, that the Indian corn was not nor was any part of it the property of the plaintiff.

5th. To the 4th count, never indebted.

At the trial before Richards, C. J., in April 1868, at Chatham; it appeared in evidence that one Hosey, by an arrangement with the defendant, in May, 1865, planted $16\frac{1}{2}$ acres of defendant's land with Indian corn and other crops, the agreement being that Hosey was to do all the work, and that defendant was to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn and potatoes, and one-third of the residue of the Indian corn, and that Hosey was to have the remainder. Hosey, being in difficulties and indebted to the plaintiff upon a note for \$286, in August, 1865, while the Indian corn was growing, sold, as the plaintiff alleged, the crop of corn to him. The evidence as to this was, that plaintiff went out to Hosey to demand payment of the note: that Hosey told him he could not pay except by the field of Indian corn: that he took plaintiff to see the field, and that, defendant being present, Hosey measured the field with plaintiff: that defendant said it was worth \$25 per acre, and that he told plaintiff that if he bought from Hosey, he (plaintiff) was to cut it and shock it and give one-third to him, the defendant: that Hosey and plaintiff then went into Chatham and agreed upon the price of the field at \$20 per acre, the amount to be indorsed on Hosey's note to plaintiff: that the amount was accordingly endorsed then on the note, as follows (without however any signature being subscribed): "Received on this note two hundred and twenty dollars, being two-thirds of $16\frac{1}{2}$ acres of corn on A. Arnold's farm,—dated Chatham, August 2nd, 1865." Shortly after this Hosey left the country, went to Detroit and died. Before his death, and, as was proved by Hosey's wife (a witness called by defendant), Hosey on the 24th September, 1865, at Detroit, signed the following instrument: "In consideration of the sum of one hundred dollars, to me in hand paid by Alexander Arnold, of Chatham, C. W., the receipt

whereof is hereby confessed and acknowledged, I have sold, transferred, assigned and conveyed to said Arnold one certain field of corn of some 15 or 16 acres on the farm of said Arnold in Dover East, being all my right and share in the same, and which I sold and assigned to him on the seventh of August last past.

(Signed) ALEXANDER ^{His} × HOSEY.
Mark.

Witness,

H. C. KNIGHT."

There was evidence that Hosey had said that he did not wish one McKellar, a creditor of his, to get the corn, and that he said he would fix it so that he could not get it, and that when a bailiff went out to seize it, on an execution at McKellar's suit, he said the corn was Arnold's. It was also said that it was through plaintiff's instrumentality that Hosey left the country. After Hosey's death the defendant claimed the whole crop as his own and harvested and saved it.

At the close of the plaintiff's case defendant's counsel moved a nonsuit, upon the ground that no such sale or delivery of the crop by Hosey to the plaintiff was proved as would vest the property in plaintiff, and no proof of conversion by defendant; that even if there was a bargain in fact between Hosey and the plaintiff, it was not binding within the Statute of Frauds.

Leave was reserved to move to enter a nonsuit upon these grounds and the case was left to the jury, who found a verdict for the plaintiff and \$60 damages.

In Easter Term last, *W. P. Atkinson* obtained a rule *nisi* to enter a nonsuit.

Kingston now shewed cause and contended that the sale was good within the Statute, and that the property was paid for at the time and was vested in the plaintiff, and that defendant could not invoke the Statute. He cited *Warwick v. Bruce*, 2 M. & S. 208; *Sainsburry v. Matthews*, 4 M. & W. 343; *Evans v. Roberts*, 5 B. & C. 329; *Chaplin v. Rogers*, 1 East 192; *Parker v. Staniland*, 11 East 362;

Calendar v. Howard, 10 C. B. 290, 302; *Simmonds v. Humble*, 13 C. B. N. S. 258; *Hayden v. Crawford*, 3 O. S. 583, 589.

John Read, contra, contended that Hosey and Arnold were tenants in common, and that neither trover nor an action for money had and received would lie against defendants: that the evidence shewed no part payment: that the contract between Hosey and plaintiff was void, by the 17th section of the Statute of Frauds, and that the bill of sale from Hosey to the defendant passed all Hosey's interest to him. He cited *Garbett v. Veales*, 5 Q. B. 408; *Morgan v. Marquiss*, 9 Ex. 145; *Mayhew v. Herrick*, 7 C. B. 229; *Walker v. Massey*, 16 M. & W. 302; *White v. Morris*, 11 C. B. 1015; *Park v. Humphrey*, 14 C. P. 209.

GWYNNE, J., delivered the judgment of the Court.

I do not think that this case comes within the principle of *Hayden v. Crawford*, but rather that it does within that of *Park v. Humphrey*. The plaintiff's evidence shews that the defendant was the owner of the land, and, in so far as appears, it was never out of his possession, and *Hare and others v. Celey* (Cro. Eliz. 143) is an authority to shew that he alone, and not he and Hosey jointly, could have maintained an action against a stranger for trespass to the land. There is no pretence, then, of any right in the present plaintiff to sustain his action upon the first count. Then, as to the second and third counts, it appears to me that Hosey and the defendant were tenants in common of the growing crop, and that Hosey himself could not have maintained an action of trespass or trover against the defendant for the act of his reaping and harvesting the crop; but, if the defendant had consumed the corn, or if he had sold it to others who had consumed it, that I apprehend would amount to an annihilation of the article, which, upon the authority of *Barnardiston v. Chapman*, cited in 4 East. 120, and *Mayhew v. Herrick* (7 C. B. 228), would have enabled Hosey to maintain trover. That case decides that the mere sale by one of two joint owners is not a conversion as

against the other; but it seems to be established by that case that if the sale be in market overt, so as to change the property; or if the subject of the joint ownership is sold to a number of purchasers, who carry away the articles; or if the consequences attending the sale are such as to put it out of the power of the plaintiff to take the property, or to pursue his remedy against the parties who have got possession of it;—the case is different and trover will lie. Trover, then, in certain events might have been maintained by Hosey against the defendant. Then, has Hosey's estate passed to the plaintiff? If in August, 1865, at the time of the alleged sale by Hosey to the plaintiff, the latter had paid Hosey in cash the sum of \$220, which is endorsed on the note, there is, I apprehend, no doubt that the sale would have been good and that Hosey's property in the crop would have passed to the plaintiff, notwithstanding the 17th section of the Statute of Frauds; and that the case was not within the 4th section the authorities are clear.—See *Jones v. Flint* (10 Ad. & El. 753) and *Evans v. Roberts* (5 B. & C. 829). Whether the facts in this case amounted to a payment was a question for the jury. The learned Chief Justice charged the jury to say whether they were satisfied that the note produced was a *bonâ fide* debt due by Hosey to the plaintiff, and that it was made before the day of the endorsement on it; and whether they were satisfied that there was a sale by Hosey to the plaintiff of the corn, and that the amount (\$220) was endorsed on the note at the time, in pursuance of an agreement to that effect, upon which the corn was purchased. The verdict of the jury for the plaintiff must be taken as an answer in the affirmative to these questions. The plaintiff, then, on this finding must be taken to have paid the full price for the corn at the time of the bargain for its purchase being made, and so Hosey's interest and property in the chattels, which the crop was, passed to the plaintiff and could not be divested, I think, even by the subsequent bill of sale produced from Hosey to the defendant; for the delivery was as complete as the circumstances admitted, and moreover

the evidence shewed that the defendant was aware of the treaty for the purchase, and there was evidence to shew that he had acquiesced in it. However, the learned Chief Justice charged the jury that the above questions being answered in the affirmative would only complete the plaintiff's title, in the event of the jury finding that the subsequent sale to the defendant was not for valuable consideration. The finding of the jury must be taken to determine, then, that the subsequent sale, under which the defendant claimed, was not for valuable consideration; so that it appears concluded by the verdict that Hosey's property in the crop passed to the plaintiff. But, admitting it to have so passed, the plaintiff acquired no better position than Hosey himself would have continued to have if he had not sold. The plaintiff, by the sale to him, became only a tenant in common with the defendant, and could not sustain trover except for such a dealing by defendant with the crop as would amount to an annihilation of it, or such a sale as in *Mayhew v. Herrick* is spoken of as depriving the plaintiff of the power of asserting his right to the property in the hands of the person or persons into whose possession the defendant may have transferred it. Now, as to this point of the case, the evidence appears to be quite defective. There is no evidence of the defendant having annihilated the property by consumption, nor of his having sold it to any one. The question as to the plaintiff's right to recover under the count for money had and received does not appear to have been raised at the trial: without a sale by the defendant and a receipt of the price the question could not have arisen. It may be that, as the crop was grown in 1865, and the action only commenced in March, 1868, the defendant and his counsel considered that the lapse of time intervening was sufficient, if the crop was not forthcoming, or in the absence of evidence of its being forthcoming, to warrant a jury in finding that the defendant had either consumed the crop, or sold it for value and received the price, and that it was deemed most for the defendant's interest not to raise any precise question

upon this point, and to rest the defence upon the alleged defect in the sale from Hosey to the plaintiff, and the alleged perfection in the sale from Hosey to the defendant. It is true that one of the points made for the defendant was, that there was no evidence of a conversion, and it may be said that under this objection the defendant may contend that he is entitled to succeed for the want of evidence in the plaintiff's case of such annihilation or sale as would support an action of trover, or of a receipt of the price under the count for money had and received; but in view of the fact that, both at the trial and on the argument of this rule, the defendant's chief contest has been that no property in the crop passed from Hosey to the plaintiff, and that trover does not lie in any case against a tenant in common, and in view of the smallness of the verdict, I do not think we should be warranted in giving the defendant the benefit of the assumption that the property is still in existence and open to the assertion by the plaintiff of his right thereto as a tenant in common. Under these circumstances, I think, we are justified in dealing with the case as if an event has happened which entitles the plaintiff to maintain his action, if in any event he can as a tenant in common sustain it against the defendant; and as I think the effect of the verdict is to establish that the title set up by the defendant was not obtained upon valuable consideration, and that Hosey's property did pass to the plaintiff, I think the verdict should not be disturbed except in so far as the first count is concerned, upon which it seems clear that it should have been rendered for the defendant. Unless it be clear that in no event can the plaintiff recover, I do not think we should be justified in nonsuiting him, and when the damages are so small I do not think that we should mould the rule so as to grant a new trial, as no doubt we might do. Being satisfied that the contention of the defendant is not well founded upon the point upon which it appears to me he has been willing substantially to rest his case, I think the verdict should be permitted to stand on the counts I have indicated.

Plaintiff's counsel consenting in Court to judgment for defendant on the first count,

Rule accordingly.

OVENS V. TAYLOR.

Quarter Sessions a Court of Record—Assault—Fine and costs of prosecution—Imprisonment—Warrant not necessary—Sheriff—Trespass and false imprisonment—Pleading.

Held, on demurrer to the pleas set out below:—1. That the Court of Quarter Sessions in this Province is a Court of Record.

2. That such Court has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in default of payment.
3. That a warrant of commitment under the seal of the Court or signature of the chairman is not necessary.
4. That trespass will not lie against a Sheriff for executing the mandate of the Court, by committing and detaining until the fine and costs are paid, even though the latter may be unascertained at the time they are directed to be paid, and though that fact may, on *certiorari* and *habeas corpus*, entitle a prisoner to his discharge.

The second count of the declaration set out that plaintiff, at the Quarter Sessions, was convicted of two common assaults and was sentenced to pay a fine of \$1 and the costs of prosecution, and to remain in gaol till said fines and costs were paid; and defendant, being Sheriff, without sufficient warrant or authority, unlawfully arrested plaintiff and kept him in gaol for six hours, and plaintiff, being desirous of procuring his discharge, tendered to defendant \$20 as the amount of said fine and costs respectively, which plaintiff believed to be a sufficient sum for that purpose, and then demanded his discharge, but defendant refused to accept same or to release plaintiff, and refused and neglected to inform plaintiff, although requested, what sum defendant required from plaintiff to entitle him to his discharge, whereby plaintiff was prevented paying the full and proper amount of the fines and costs, although willing so to do, and to procure his discharge, and after said tender, &c., defendant unlawfully detained plaintiff in custody, &c., &c.

Held, on demurrer, a count in trespass and false imprisonment, and as such bad.

Quære, whether, if the count had directly charged it as a duty incumbent on the Sheriff to give the information said to have been requested of him, and assigned as a breach a neglect or refusal on his part to give the same, it would have disclosed a good cause of action in *Case*.

Quære, also, as to the propriety or impropriety of the Court of Quarter Sessions directing imprisonment to be continued until *costs* as well as fines be paid.

The first count of the declaration was trespass and imprisonment.

The second count set out that plaintiff, at the General Court of Quarter Sessions of the Peace for the County

of Hastings, was convicted of two common assaults, and was sentenced to pay a fine of \$1 and the costs of prosecution on each conviction, and to remain in gaol till said fines and costs were paid; and defendant, being Sheriff of said county, without any sufficient warrant and authority, unlawfully arrested plaintiff and kept him in the common gaol for six hours; and then plaintiff, being desirous of procuring his release from custody, tendered to defendant \$20, as the amount of said fines and costs respectively, and which plaintiff believed to be a sufficient amount for that purpose, and then demanded his discharge, but defendant refused to accept same or to release plaintiff, and refused and neglected to inform plaintiff, although requested, what sum defendant required from plaintiff to entitle him to his discharge; whereby plaintiff was prevented paying the full and proper amount of the fines and costs, although willing so to do, and to procure his discharge, and after said tender, &c., defendant unlawfully detained plaintiff in custody, &c., &c.

To first count defendant pleaded not guilty; secondly, setting out plaintiff's conviction for assault at the Court of Quarter Sessions for County of Hastings, and his sentence to pay \$1 fine and costs of prosecution, and to remain in gaol till debt and costs paid; also the same for another assault, and same sentence; that defendant was Sheriff and was duly commanded by said Court to keep plaintiff in gaol on said conviction, and the Clerk of the Court, under his hand and seal, and under the seal of the Court, delivered to defendant the warrant or calendar, whereby defendant was commanded to keep plaintiff in gaol until he paid the fines and costs, and justifying thereunder, &c.

To second count defendant pleaded not guilty and denial of tender of the fines and costs as alleged.

Demurrer to second plea to first count:—

Plea no answer.

No sufficient warrant or written authority to commit, authenticated by seal of Court or signature of Chairman, shewn.

Said Court had no authority to pronounce such sentence and the order to commit void.

Plea defended the detention only.

Court could not imprison in order to enforce a fine or award costs.

Sentence amounted to perpetual imprisonment.

Demurrer also to second plea to second count:—

No answer to charge of neglecting to state amount required for plaintiff's discharge.

Not in bar, confession or avoidance.

Not stated costs taxed, so that plaintiff could pay same.

Plaintiff also excepted to the second count:—

No cause of action, as to the detention shewn, unless defendant acted maliciously.

Not alleged defendant had notice of amount of costs, nor that plaintiff tendered amount thereof.

Sheriff not answerable, and judgment never reversed.

Defendant not the officer to whom tender should be made, and no order of Court made for plaintiff's discharge.

J. A. Boyd and Dickson, for plaintiff, cited *Re Pater*, 10 Jur. N. S. 972; *Follett v. The Queen*, 2 Ir. L. R. 335; C. S. U. C. ch. 117, secs. 3, 4, 5, 15, and form of warrant at p. 970, ch. 106, secs. 3, 4; *Regina v. ———*, 8 A. & E. 589; *Reg. v. Long*, 1 Q. B. 740; *Mount v. Selwood*, 1 Q. B. 726; *Locke v. Selwood*, 1 Q. B. 736; *Reg. v. Hall*, Cowp. 60; *Reg. v. Justices of Hampshire*, 32 L. J. Mag. Can. 46; *Dickinson*, Q. S. 589; *Hill v. Bateman*, 2 Strange, 710; *Carratt v. Morley*, 1 Q. B. 18, 29; *Clarke v. Woods*, 2 Ex. 395; *Barton v. Bricknell*, 13 Q. B. 393; *Daniel v. Phillipps*, 1 C. M. & R. at p. 673; *Smith v. Gibson*, 1 Wil. 153; *Wildes v. Morris*, 22 L. J. Mag. C. 4; *Reg. v. Clarke*, 5 Q. B. 887; C. S. U. C. ch. 91, secs. 37, 38, 41, 43; *Pollard v. Gerrard*, 1 Ld. R. 703; *Burns Justice*, 29 ed. I. 689.

K. McKenzie, Q.C., contra, cited C. S. U. C. ch. 119, sec. 4; 34 Ed. III. ch. 1; *Reg. v. Hampdens*, 9 *Howell's State Trials*, S. T. 1126; *The Six Carpenters Case*, 8 Co. p. 432; *Brooke v. Hodgkinson*, 4 H. & N. 712; *Turner v. Felgate*,

1 Lev. 95; *Cameron v. Lightfoot*, 2 Wm. Bl. 90; *Tarlton v. Fisher*, 2 Doug. 671; *Smith v. Egginton*, 7 A. & E. 167; *Shorland v. Govett*, 5 B. & C. 485; *Crozer v. Pilling*, 4 B. & C. 26; *Thomas v. Hudson*, 14 M. & W. 353; *Slackford v. Austin*, 14 Ea. 468; *Grahame v. Smart*, 18 U. C. 482.

HAGARTY, C. J.—The first question raised was as to the power and jurisdiction of the Court of Quarter Sessions. It is hardly necessary to cite authority to shew that it is a Court of Record, though I believe that, as well as every thing else, was contested by the plaintiff.

The conviction was for an assault, and the sentence a fine of \$1 and costs of prosecution, and imprisonment in gaol till payment, and I think the jurisdiction to try such a charge sufficiently appears.

We entertain no doubt of the Court having power to fine and imprison for an assault. Every book is clear on the point, and the Session Act, 34 Edw. 3, ch. 1, is express: They are to hear and determine at the King's suit all trespasses and felonies done in the county, &c. * * and that fines which are to be made before Justices for a trespass done by any person are to be reasonable and just, &c., &c.

1 *Russell* on Crimes, 877:—"Assault.—This offence is punishable as a misdemeanour, and the punishment usually inflicted is fine, imprisonment, and sureties to keep the peace."

Dickinson Quarter Sessions, 581, to same effect:—"When a fine is directed, imprisonment until it is paid is the usual direction. If the latter alternative be taken away, the imposition of the fine would be a useless proceeding in many cases."

In 4 *Black. Com.* 380, the origin and practice as to fines are explained:—"It is never usual to assess a larger fine than a man is able to pay without touching the implements of his livelihood, but to inflict corporal punishment or a limited imprisonment instead of such fine as might amount to imprisonment for life; and this is the reason why fines in the King's Court are frequently denominated ransoms,

because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine, according to an ancient maxim, "*Qui non habet in crumend, luat in corpore*,"

As to the want of a sufficient warrant, I do not consider it to be necessary that there should be any warrant under seal of Court or signature of Chairman. The sentence of a Court of Record is pronounced orally in open Court and an entry thereof is made by the Clerk in the book in which the proceedings are recorded, and it can be proved in any legal proceeding. The exemplification of it is (as stated in *Archbold* Crim. Pl. 206) in strictness obtained on *certiorari*, "but the general practice is to apply to the Clerk of the Peace, &c., who will make it out for you or attend with the record itself at the trial. * * When the entry of the order in the book had a regular caption, and was in the present tense, and in every other respect like a record, and it was proved that no other record is ever made up, this was held to be legal evidence of the order : *Reg. v. Yeaveley*, (8 L. J. M. C. 9)."

The plea states that after sentence pronounced the Clerk of the Court, under his hand and under the seal of the Court, delivered to defendant the warrant or calendar and authority of the said Court, whereby the defendant, as Sheriff, was commanded, &c., &c.

Sir William Erle, C. J., in *Kemp v. Neville* (10 C. B. N. S. 554) says: "We would further observe that all Judges of Record have power to commit to the custody of their officer, *sedente curia*, by oral command, without any warrant made at the time. This proceeds upon the ground that there is in contemplation of law a record of such commitment, which record may be drawn up when necessary. Indeed, for a like reason no warrant is required for the execution of a sentence of death (2 Hales, P. C. ch. 57, page 409)." He quotes also the case of *Watson v. Bodell* (14 M. & W. 70), where Parke, B., says: "It is clear that a Court of Record may commit by order to the custody of its officer in open court, as the Queen's Bench or Quarter Sessions, for there

is, or ought to be a record of such commitment (2 Hale P. C. 122), and the order given, *sedente curia*, by the Court in this case would probably be a protection to the officer."

We all know that, as a matter of practice, the Judge of a Criminal Court of Record does not sign any sentence or warrant directing any punishment. In two or three of the counties in this Province it has been the habit of Clerks of Assize to prepare a calendar of the names of persons convicted, the crime and sentence, and to ask the Judge to sign it; but it is very rarely done and there seems no necessity for it in a Court of Record.

In the absence of express authority I do not feel disposed to throw any doubt upon a practice that has prevailed unquestioned for so many years.

The sentence of the Court so pronounced was to pay a fine of \$1 and the costs of prosecution, and imprisonment till fine and costs should be paid.

The charge on which plaintiff was tried was within the jurisdiction of the Court, as was the imposition of the fine and the imprisonment till paid.

As to costs, sec. 4 of ch. 119, U. C. Consol. Stat. (page 972) enacts that, in case "any person be convicted before any Court of Quarter Sessions of any assault and battery or other misdemeanour, such person shall pay such costs as may be allowed and taxed by the Court."

Again, sec. 3 of ch. 106 has a direction as to the costs ordered to be paid at Quarter Sessions by a defendant.

In the view I take of the law it is unnecessary to discuss the questions raised by plaintiff, as to how and when these costs should be taxed or ascertained, nor as to the right of the Court to direct imprisonment till these costs were paid. There is nothing alleged in the record as to whether they were taxed and ascertained or not, and we are not, I think, as against the officer, who merely did his duty in obeying the sentence of the Court, to intend anything one way or the other.

The cases are numerous as to the liability of the officer of the Court.

The Marshalsea Case, 10 Co. 383.—“A difference was taken when a Court has jurisdiction of the cause and proceeds *inverso ordine*, or erroneously, then as to the party who sues, or the officer or Master of the Court, who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, then the whole proceeding is *coram non iudice*, &c., &c. * * If the Court, on a plea of debt, awards a *capias* against a Duke, Earl, &c., which by the law doth not lie against them, and if the Sheriff arrest them by force of the *capias*, although the suit be against law, notwithstanding, inasmuch as the Court has jurisdiction of the cause, the Sheriff is excused.” See cases collected in note. To the same effect is *Tarleton v. Fisher* (Doug. 671). Buller, J.: “The general law as to Sheriffs is that if a Sheriff has acted in obedience to the mandate of the Court he is excused. If he arrest a Peer the suit is erroneous; yet he is not a trespasser for executing it. In trespass the defendant must shew an excuse. Have the defendants done so in this case? Yes; for the mandate of the Court was compulsory on them.” *Moravia v. Sloper* (Willes 33) is to the same effect, and Parke, B., says of it in *Watson v. Bodell* (14 M. & W. 61), “It has been held that an officer is justified in obeying the writ when it appeared to authorize him, and the Court issuing it had general cognizance of the matter.” He is speaking of commitments, not sentences, and again says, “It is clear that a Court of Record may commit by order to the custody of its officer in open Court, as the Queen’s Bench or Quarter Sessions, for there is or ought to be a record of such commitments, and the order given, *sedente curia*, by the Court in this case would probably be a protection to its officer.” He was giving judgment in a case of trespass against a messenger in bankruptcy, where the Court held the warrant, on which plaintiff was taken, was spent by his submitting to examination, and the Commissioners directed his discharge on payment of costs, and the Statute gave no power to detain for costs.

Thomas v. Hudson (14 M. & W. 353) was an action for escape, where the Sheriff discharged a prisoner, on an order for his discharge from a Commissioner in Bankruptcy. The Court was of opinion that the order was wrong, as the judgment debt was not one which the order could effect: "Whatever be the true construction of this act, the defendant was bound to obey the order of the Commissioner as that of a Judge acting in a matter over which he had jurisdiction.

Painter v. Liverpool Gas Co. (3 A. & E. 433). A warrant had issued without previous summons to the party, and Lord Denman points out that the very terms of it, referring to a conviction, make it evident that the party ought to have been first summoned: "A warrant is a justification to officers, because they are not to canvass the legality of the process they have to execute." Littledale, J.: "Such a warrant, though irregular, would be a protection to an officer, as he is not entitled to set up his private opinion against that of the Justice as to the goodness of the warrant." Williams, J.: "It would be wild work if the officer were entitled to scan the warrant delivered to him, for the purpose of ascertaining whether it was regular or not under the circumstances of the case."

Andrews v. Marris (1 Q. B. 16) is to same effect. *Car-ratt v. Morley*, which follows it, arrives at an opposite conclusion, as there was no jurisdiction and the warrant "no more than waste paper." *Dews v. Riley* (11 C. B. 434) was for trespass against the Clerk of a County Court, for causing plaintiff's arrest on a warrant issued under the seal of the Court for non-payment of money ordered by the Judge to be paid. The Judge's order was bad for reasons stated. Jervis, C. J., says, "The Clerk is a mere ministerial officer to carry into effect the order of the Judge, and cannot be liable in trespass for the mere performance of a duty cast upon him by the express language of the Act of Parliament."

The last case is commented on in *Graham v. Smart et al.* (18 U. C. 485). Sir J. Robinson says: "The principle seems to be universally understood; for no one ever heard

of the Clerk of a Court, or a Justice Clerk, being sued as a trespasser for any act done by him in a ministerial capacity in carrying out the order of his superior. It is not his business to question the soundness of the decision upon which he is directed to act in the ordinary course of his duty."

In *Burke v. Hodgkinson* (4 H. & N. 712) a *ca. sa.* was issued for a sum under £20. Watson, B.: It is sufficient to say that, though the Sheriff might justify under the writ, the defendants (the execution plaintiff and attorney), who have caused plaintiff to be taken in execution, are liable in this action. In my opinion this writ is not merely irregular, but absolutely void, because it has issued contrary to law." The defect appeared on the face.

It was strongly urged that the whole sentence was bad, because unascertained costs were directed to be paid and imprisonment till then. I have already remarked that, in the absence of express averment, I am not disposed to intend that such was the case: for aught that appears they may have been taxed and ascertained before the actual commitment.

But, even if it were as plaintiff contends, I do not see how that can make the defendant a trespasser. It might be that, in a return to *certiorari* and *habeas corpus*, the plaintiff would for that reason have been entitled to his discharge. It does not follow that trespass will lie therefore for the detention.

In *Moffatt v. Barnard* (24 U. C. 498) trespass was brought against a magistrate. The warrant set out the offence and a fine of \$5, and \$10 costs, and committed plaintiff to gaol for twenty-one days, unless these sums and the costs of conveying him to gaol, amounting to —, should be sooner paid. Plaintiff was discharged on *habeas corpus* and conviction was quashed, and this omission was strongly insisted on. The Court held that trespass would not lie against defendant, and the same course was taken in *Dickson v. Crabbe* (same vol. p. 497). Draper, C. J.: "We do not hold that the irregular form of a warrant, when the

Justice had jurisdiction over every subject matter to which the warrant relates, should be construed to be an excess of jurisdiction, so as to deprive him (the magistrate) of the protection of the Act."

I think it impossible to hold that a Sheriff can be held to be a trespasser for his obeying the sentence of a Court of Record, pronounced in the usual manner in open Court, in a matter over which the Court had jurisdiction, in consequence of any such omission as is alleged to have occurred here respecting the costs. The Sheriff may well be supposed to know nothing as to whether the costs are ascertained or not, and I think it would be a most unhappy state of the law, if he, the officer of the Court, bound to execute its mandate, should be responsible for any irregularity in the mere form of a sentence, when the sentence itself was on a subject matter under the jurisdiction of the Court.

I agree that the defendant should have judgment on the second count, on the grounds stated by my brother Gwynne.

GWYNNE, J.—I concur in the judgment of the Chief Justice on the demurrer to the plea to the first count.

We have had some little difficulty in determining what is the cause of action relied upon in the second count, and whether it is for trespass and false imprisonment, or in case, for the default or neglect of the defendant in not communicating to the plaintiff information which it was a duty imposed upon him by law to communicate. We have, however, arrived at the conclusion that the cause of action intended to be set out in this count also, as in the first, is one of trespass and false imprisonment, and as such, we think, the count discloses no cause of action. It begins by setting out the conviction of the plaintiff by the Court of Quarter Sessions of the County of Hastings for two several assaults, and his being sentenced upon those convictions to pay certain fines and costs, and to be imprisoned in the common gaol of the county until the said fines and costs respectively should be paid, and that the defendant, being Sheriff of the county, thereupon,

that is, upon such conviction and sentence, without any sufficient warrant and authority, unlawfully arrested the plaintiff and imprisoned him in the common gaol of the county for the space of six hours. This is that imprisonment which the demurrer to the second plea to the first count admits that the plaintiff is proceeding for in the first count, and if the facts here alleged disclosed a false imprisonment, the second count would be perfect if it stopped here; but we have already expressed our opinion that the conviction and sentence of the Quarter Sessions were a sufficient authority to the Sheriff, as the officer of the Court, to arrest and imprison the plaintiff in obedience to the mandate of the Court. The count, however, proceeds to aver that after the expiration of six hours the plaintiff, believing the sum of \$20 to be sufficient to cover the fines and costs, tendered that sum *as the amount* of the fines and costs and demanded his discharge, but that the Sheriff refused to receive the amount tendered, or to relieve the plaintiff from such custody and imprisonment, and still detained the plaintiff in custody. Here we see a cause of action, which might render the defendant liable, if it be sufficiently stated; for, inasmuch as the conviction and sentence stated only authorized the Sheriff to detain the plaintiff until the fine and costs were paid, it may be that he is a proper person to whom tender and payment of the fine and costs should be made, and if he be, then detention by the Sheriff after such tender would be his own act, and would not be justified by the conviction and sentence. We are not surprised, therefore, that defendant's counsel should have entertained the belief that this was the cause of action intended to be relied on in this count, and that, influenced by such belief, he should have pleaded denying the tender. Whether it was prudent for him, having regard to the guarded vagueness of the statement of this as a cause of action, to have pleaded this plea, instead of demurring, may be questioned, for it would seem to put in issue a matter not alleged, namely, a tender of *the amount* of the fines and costs. We think, however,

that the pleader not unreasonably fell into this mistake ; but that it was a mistake now appears, for the plaintiff demurs to this plea for this very defect into which we think he himself has led the defendants, and he insists that the cause of action is not yet disclosed, notwithstanding these two apparent attempts in one count of disclosing a cause of action for trespass and false imprisonment : the gist of this count, as he contends, being that it alleges that the defendant refused and neglected to inform the plaintiff what sum the defendant required or demanded from the plaintiff, although requested so to do, in order to entitle the plaintiff to his discharge, on account of which refusal and neglect the plaintiff, although ready and willing, was prevented from paying the full and proper amount of such fines and costs respectively ; and *after the said tender, and after the plaintiff's demand to be released* and discharged from custody and imprisonment, as aforesaid, the defendant unlawfully kept and detained the plaintiff in custody and imprisoned him for six weeks more. This we hold to be clearly a declaration as for a false imprisonment by the Sheriff after a tender, which tender we hold to be, as the plaintiff, indeed, himself, by his demurrer to the second plea to this count, admits to be, insufficiently stated ; in fact, the cause of action here stated is carried no further than in the previous part of the count where a detention after tender is stated. What the plaintiff intended to put forward, as the gist of this count, however, we suppose to be, that the Sheriff, after refusing to give the plaintiff the information, which he says was necessary to enable him to make a sufficient tender, unlawfully detained the plaintiff and imprisoned him, &c., &c. Had the allegation been such we should still be of opinion that the count is defective, for the conviction and sentence is shewn to be that the plaintiff shall be imprisoned until *payment* of the fines and costs ; so that, although the Sheriff should refuse, even wrongfully and contrary to his duty, to give the plaintiff the information asked for, such refusal could not operate as a payment or tender, and could not satisfy the convic-

tion and sentence, and could not divest them of their operative qualities. The continued detention and imprisonment, therefore, would still be authorized and commanded by the conviction and sentence, notwithstanding such refusal.

A refusal to give the information we take to be very different from a refusal to accept the amount of the fines and costs when tendered, which, as we have said, if the Sheriff be the proper person to whom to make the tender, would operate as payment, and so would satisfy the requirements of the sentence, and make the subsequent detention and imprisonment of the plaintiff the act of the Sheriff himself, unauthorized by the conviction and sentence. We think, therefore, that this count makes three, or at least two, ineffectual attempts to disclose a cause of action as for false imprisonment.

If the plaintiff intended to insist upon the refusal of the Sheriff to give the information said to have been requested of him, as a breach of duty, he should, we think, have alleged the duty and its breach and made that not merely matter of recital and inducement, but the gravamen of his count, instead of alleging the gravamen to be an imprisonment which, in so far as the Sheriff is concerned, is shewn to have been authorized until payment. It may be questionable whether such a count would disclose a cause of action in case, that is, we mean, whether the plaintiff could establish, as a proposition of law, that the refusal or neglect, as it is stated, of the Sheriff, to give information which might, perhaps, have readily been obtained by application to the Clerk of the Peace, the Clerk of the Court, which imposed the fines, and who under the inspection of the Court taxes the costs, is such a breach of duty as would expose the Sheriff to an action; whether such his neglect or refusal would not be a *damnum absque injuria*, for which no action lies. Upon this point we express no opinion, for we do not think the count is framed as for such a cause of action: we hold it to be a count in trespass and false imprisonment, not disclosing a cause of action against the

Sheriff, who, in so far as is disclosed, detained the plaintiff in custody in obedience to the conviction and sentence of a Court of Record, whose officer he is, and whose mandate it was his duty to obey, whatever responsibility in damages he may have incurred by his alleged refusal or neglect to give the required information; as to which responsibility, whether it has been incurred or not, we express no opinion.

We express no opinion either as to the propriety or impropriety of the Court of Quarter Sessions directing the imprisonment to be continued until the *costs* as well as the fines should be paid, as the point does not necessarily arise in this case. If the sentence be, as was contended, erroneous in this particular, the law provides a remedy, to which that recourse should be had is more for the interest of the public than that the Sheriff should be held responsible in damages to the injured party for the errors of the Court.

J. WILSON, J., concurred.

Judgment for defendant on demurrer.

SPRING V. COCKBURN ET AL.

Written contract—Verbal evidence to explain technical term—Non-direction as ground for new trial—Excessive damages—Weight of evidence.

Defendants contracted in writing to purchase from plaintiff 1000 "prime" saw logs, at so much per 1000 cubic feet, which defendants sent their agent to cull and measure. Plaintiff charged the agent not to select any that did not conform to the contract, but notwithstanding this the agent, without complaint or comment, marked the logs with defendants mark, designating them as of *two* qualities, and defendants, instead of refusing them, accepted and used them, without informing plaintiff of the mode adopted by their agent, or giving him the opportunity of shewing that the logs did in fact conform to the contract, and at the same time refusing to pay for the second quality more than half the price agreed to be paid for "prime" logs. On the trial of an action brought to recover the full contract price of the logs (for which the jury gave a verdict), a witness called by plaintiff was asked to explain the meaning of the word "prime," and as he stated that the word had no technical meaning, and was not used in the trade, his evidence was objected to by defendants' counsel, but received by the learned Judge:

Held, that the evidence under the circumstances was admissible, and that, even if inadmissible, the improper reception of evidence to explain a written contract being ground for a new trial only when it leads to misdirection, which was not complained of, the defendants could not now urge it.

Held, also, if the Judge did not charge as strongly in defendants' favour as it was thought he ought to have done, the proper form of objection would have been for non-direction, which, however, was only ground for granting a new trial when the verdict was against the weight of evidence, which did not appear in this case; nor that damages recovered by plaintiff were, under the circumstances of the case, excessive.

This was an action on the common counts for goods sold and delivered, &c., &c., to which the defendants pleaded never indebted, payment, and set-off.

By the bill of particulars annexed to the record, the plaintiff's claim was stated to be for "1000 pine logs, being 252,937 cubic feet, board measure, delivered under a contract between the plaintiff and the defendants, dated 22nd November, 1866, at \$2.50 per thousand, amounting to \$632.50.

The case was tried at the last Spring Assizes at Whitby, before Adam Wilson, J.

By the contract produced at the trial it appeared that plaintiff contracted to supply defendants with 1000 prime saw logs of white pine timber, of certain specified lengths,

at the price before mentioned, and defendants agreed to advance to plaintiff two-thirds of the value of the logs as the work progressed and to pay the balance on the delivery of the logs. One Jacob Brunell, called as a witness for the plaintiff, testified that he had cut the logs and helped to get some of them out; that they were very good logs and were delivered at a place named in the contract; and that they were measured by one McKenzie acting on behalf of defendants; that he rejected some which he did not mark, but that all not rejected were marked by him with the defendant's mark, and that the logs were worth \$2.50 per thousand, board measure; that while McKenzie was measuring the logs plaintiff told him not to take any but what would answer the contract; that he had it in the house and would shew it to him, but that McKenzie did not ask to see it when plaintiff said he could shew it to him; that plaintiff told McKenzie he was to get \$2.50 under his contract and not to take anything that would not give him that price.

McKenzie, who was also called by plaintiff, testified that he was sent by the defendants to cull the logs; that he marked them as two qualities; that plaintiff was present at the measurement, but that he did not tell him that he was making two qualities of the logs, for that he thought he understood it, as that was the way he measured that season for every one from whom the defendants bought logs, and no one asked the question, nor did plaintiff. He said he gave to the plaintiff notes of the measurement he made; that he marked as second quality such logs as he thought would not produce prime lumber; that for second quality the defendants were only paying that season \$1.25; that he was present when plaintiff and defendants were trying to agree as to the logs, the defendants wanting to pay as for two qualities, and the plaintiff insisting on \$2.50 for all; that he never told plaintiff he was discriminating the logs, and that he did not remember the plaintiff telling him not to take the logs unless they answered the contract, and that he did not think he did so tell him.

One Warren said that he also was present at the measurement for a quarter of an hour or so ; that he heard no fault found with the logs ; that they were good logs and were marked i. e. for defendants.

One Joseph Gould was called who described himself as having been engaged in the lumber trade for thirty years. He said "prime logs" is not an expression used in the lumber business. Being asked what he, as an old lumberman, would understand by the expression, defendant's counsel objected to the question, but being allowed by the learned Judge, he answered that he would understand by it "a stock of good common logs that would make good common merchantable lumber, such as would be hauled out of the woods sound ; not punky or affected with ring bolts ; the party to take the whole, large and small, except the rotten culls ; that "prime logs" had no meaning in the trade ; that he had never heard it used till then ; that there was clear and common lumber, and "prime logs" would be everything above shipping culls. On cross-examination by defendants' counsel he said : "I have bought logs as clear and common, and as first class. First quality would be clear logs ; second class would be common, but sound. First class is capable of a precise meaning ; second class is more indefinite, and I would ask the person to explain it."

One Watson testified that he saw part of these logs ; that he considered them very good ; that he had been engaged in lumber business ; that he did not know what the expression "prime" logs meant ; that he would call "prime logs" what would make good sound merchantable lumber. On cross-examination he said that he had seen two-thirds of the logs and he asked the plaintiff where he had got such good logs.

The defendants called no witnesses and it was contended for them that plaintiff could not recover for the second quality of logs, as "prime" logs, and that the Court must interpret the term "prime."

The learned Judge left the case to the jury, telling them that a bargain to deliver so many logs, without any desig-

nation attached, descriptive of quality, would mean such logs as were fairly fit for the purpose for which they were required, namely, for sawing into good merchantable lumber; but that the word "prime" attached meant something more.

No objection was taken to this charge, and the jury found for the plaintiff the full amount of the contract price of \$2.50 per thousand.

Hector Cameron now moved to set aside this verdict on the ground of the improper reception of evidence, namely, the evidence of the witness Gould; and because the verdict was against evidence; and for excessive damages, the jury having allowed the full contract price, whereas, as he contended, the second quality should only have been paid for at \$1.25.

Harrison, Q. C., shewed cause, citing *Lucas v. Bristow*, E. B. & E. 907; *Mallan v. May*, 13 M. & W. 511; *Street v. Blay*, 2 B. & Ad. 456.

Cameron, contra, cited *Malcomson v. Morton*, 11 Ir. L. Rs. 230.

GWYNNE, J., delivered the judgment of the Court.

There can be no doubt that a person, who contracts to buy an article of a designated quality, may refuse to receive the article if it do not conform to the quality, and can on that ground defend an action for the price. Neither can there be any doubt that words used in a written contract are to be construed according to their strict and primary acceptation, unless from the context of the instrument and the intention of the parties to be collected from it they appear to be used in a different sense; or unless, in their strict sense, they are incapable of being carried into effect; and subject always to the observation that the meaning of a particular word may be shewn by parol evidence to be different in some particular place, trade or business from its proper and ordinary acceptation. So neither can there be any doubt that, although evidence is admissible to explain what is doubtful, it is not admissible

to contradict or vary what is plain. But I cannot agree that, in the admission of the evidence of the witness Gould, this rule has been violated; nor can I see any just ground of complaint, when we read the whole of his evidence, which the defendants can urge to the reception of it. The contention of the plaintiff was not, that I can see from any part of the evidence, that a meaning was to be attached to the word "prime" in this contract, contradictory of, or varying from, its ordinary acceptation, or that it had in the lumber trade any known special meaning. A witness might, I think, without objection, be asked to describe the properties of "prime logs," with the view of shewing by the same witness, or by others, that the logs in question had all those properties, and so conformed to the contract. The plaintiff's contention throughout appears to have been that the logs were good logs; conformable to the contract; and that they were accepted and received as such by the defendants; that he only offered them as in fulfilment of the contract, and that he warned the defendants' agent not to mark any which should not conform to the contract; that in presence of this warning, without complaint or comment, the agent marked them with defendants' mark; secretly, it is true, in his own mind, not communicated to the plaintiff, designating them as *two* qualities; and that the defendants, in fact, instead of refusing the logs as they might have done, if not conformable to the contract, accepted and used them, without giving the plaintiff any information of the secret reservation in their agent's mind, or any opportunity of insisting that the logs did conform to the contract. Then, taking Gould's testimony as a whole, we find the defendants extracting from him that, although he had never heard of the expression "prime logs" being used in the lumber trade, still, that he had heard and known as in common use the expressions "clear" and "common," and "first quality," which would mean "clear logs," and "second quality," which would mean "common, but sound;" and this, as I understand the defendants, is the precise meaning which they attach to the words "prime logs."

Upon this evidence the defendants' counsel urged before the jury that a distinction should be made in the price, according to their opinion of the quality of the logs delivered, and he receives without objection, as favourable to his contention (for he did not make at the trial, nor does he now make, any objection for misdirection), the charge of the learned Judge, who told the jury that the word "prime" must mean something more than logs fit for sawing into good merchantable lumber. Under these circumstances the defendants cannot, in my opinion, be now permitted to ask to set aside the verdict upon the ground of reception of improper evidence, if the evidence was inadmissible. The improper admission of evidence to explain a written contract is no ground for a new trial unless it leads to misdirection: *Bruff v. Connybear* (13 C. B. N. S. 274); for it remains still with the Judge to put a construction on the contract; and here there is not only no objection for misdirection, but the charge of the learned Judge upon the precise point is rather favourable than otherwise to the defendants. If in the opinion of the defendants' counsel the learned Judge had not charged in his favour as strongly as he thought he should, the proper form of his objection should be for nondirection, and upon the authority of *Ford v. Lacey* (30 L. J. Ex. 352), adopted by the Privy Council in the *Great Western Railway Co. v. Braid* (1 Moore Privy C. C. N. S. 101, and 9 Jur. N. S. 339), nondirection is only a ground for granting a new trial when the verdict is against the weight of evidence. If then, nondirection had been objected at the trial and had been made a ground in moving this rule, I should still be of opinion that it should be discharged; for, upon reading the evidence, wholly irrespective of Gould's testimony, I do not think it surprising that, under all the circumstances, and having regard to the fact admitted by McKenzie himself, that he did not communicate to the plaintiff that he was making two qualities, and to the fact that he stated no defects which the logs which he marked as second quality had, and that he only marked them so because

in his secret mind he thought they would not make prime or first-class lumber, the jury rendered the verdict which they did. There was a specific description stated in the contract as to lengths and thickness, with which the logs should conform, and there is no suggestion that any fell short of these requirements. There is not, in my opinion, sufficient to warrant me in holding that the verdict is against the weight of evidence, or that the damages are excessive. I am of opinion, therefore, that the verdict should stand and the rule be discharged with costs.

Rule discharged, with costs.

REGINA V. MCGREGOR.

Nuisance—Disputed surveys—C. S. U. C. ch. 93, sec. 6—Sufficiency of petition under.

On an indictment for nuisance in obstructing a highway, the Crown put in the application by way of petition, under C. S. U. C. ch. 93, sec. 6, to the County Council of the County of Kent, in these words: "We the undersigned freeholders of the fourth ward of, &c., humbly shew: That your humble petitioners are labouring under a most weighty grievance in consequence of a dispute having arisen out of the different surveys of the, &c., and as it would appear that no final adjustment can be brought about other than is provided by the 31st clause of the 12 Vic. ch. 35, your petitioners humbly pray that the County Council of, &c., will give this our prayer a due consideration, and by acting upon the above named clause of the 12 Vic. ch. 35, you will further and preserve the best interests of your petitioners: as the matter now stands it is impracticable for us to expend our public money or perform our statute labor, having no guarantee that the same will prove to be properly applied." There was also produced a memorial by the County Council of Kent, to the Governor General, under the same Act, stating that over two-thirds of the freeholders of, &c., had petitioned the council for a survey to be made of the line in dispute, in order to clear up a doubt that existed as to the site of the concession in question, owing to the dispute that had arisen out of the different surveys, and referring his Excellency to a copy of the petition, by which it would be seen that the petitioners bound themselves to be governed by the conditions of 12 Vic. ch. 35, sec. 31 (C. S. U. C. ch. 93, sec. 6), and praying that the said line might be surveyed. It was proved and not disputed that the necessary number of resident landholders under the Act had applied for the survey, but it was objected that the *petition* did not shew this:

Held, following *Cooper v. Wellbanks*, 14 C. P. 364, that everything was to be presumed to be done correctly until the contrary was proved, and here it had been proved that the necessary number of persons under the Act had applied for the survey.

Held, also, as to the other objections, viz., that the petition did not shew any want or obliteration of the original survey, and that neither petition nor memorial prayed for placing monuments, that the two documents could not be read in any other sense than as containing an application to the Governor requesting the making of a survey under the Act, and if to be made under the Act, then that the marking by permanent stone boundaries under the direction of the Commissioner of Crown Lands, in the manner prescribed by the Act, was an incident to the survey necessarily involved in the application for the survey; and therefore *Held*, that the petition was sufficient.

This was an indictment for a nuisance, charged to have been committed on a public highway in the Township of Chatham.

The trial took place before Gwynne, J., at the last Fall Assizes for the County of Kent.

The highway in question was the concession line between the first and second concessions of the North Gore of the Township of Chatham.

At the trial the Clerk of the County Council of the County of Kent was called as a witness, and produced a petition presented to the County Council, which was as follows :

“To the County Council of the County of Kent, in Council assembled :

*“GENTLEMEN :—*We the undersigned freeholders of the fourth ward of the North Gore of the Township of Chatham humbly shew : That your humble petitioners are labouring under a most weighty grievance, in consequence of a dispute having arisen out of the different surveys of the first concession of the North Gore of the above named township, and as it would appear that no final adjustment can be brought about other than as provided by the 31st clause of the 12 Vic. ch. 35, your petitioners humbly pray that the County Council of the County of Kent will give this our prayer a due consideration, and by acting upon the above named clause of the 12 Vic. ch. 35, you will further and preserve the best interests of your humble petitioners. As

the matter now stands it is impracticable for us to expend our public money or perform our statute labor, having no guarantee that the same will prove to be properly applied. Your petitioners, on their part, obligate themselves to be governed by the above clause of the 12 Vic. ch. 35." This petition was signed by some twenty-three persons, who, it was proved, exceeded one-half of the resident landholders in the concession, and two-thirds of the landholders within the limits of the disputed line. A certificate of the Township Clerk, bearing date the 8th June, 1863, was produced and proved, which certificate was as follows :

" I hereby certify that after examining the assessment roll of the township and North Gore of Chatham for 1863, that the petition of A. Cronk and others to your honorable body bears the signatures of over two-thirds of the landholders within the limits of the disputed line.

" Given under my hand and the seal of the Corporation this 8th day of June, 1863.

" (Signed) RICHARD HOUSTON, *Clerk*,"

It was further proved that the petition, with the above certificate, was read in Council on the 11th June, 1863, whereupon and on the same day it was referred to the Committee on Roads and Bridges; that the Committee reported on the 12th of June, and recommended that an application be made to the Government to carry out the object of the petition; that the report was adopted by the Council, and that, in pursuance thereof, a memorial was addressed and sent to the Government, which was as follows :

"To His Excellency The Right Honorable Charles Stanley Viscount Monck, &c., &c.

" The petition of the Municipal Corporation of the County of Kent, in Council assembled, humbly sheweth :

" That over two-thirds of the freeholders of the first concession of the North Gore of the Township of Chatham have petitioned this Council for a survey to be made of the said line, in order to clear up a doubt that exists as to the

site of the said concession, owing to a dispute that has arisen out of the different surveys that have been made. Your petitioners beg leave to refer your Excellency to a copy of the petition from the parties interested, by which it will be perceived that they bind themselves to be governed by the conditions of the 31st clause of the 12 Vic. ch. 35. Your petitioners, therefore, respectfully request that Your Excellency will be pleased to order that the said line be surveyed, and your petitioners as in duty bound will ever pray."

It was further proved that, in reply to this memorial, the Council received a letter from the Assistant Commissioner of Crown Lands, dated the 14th August, 1863, informing the Council that "instructions had on that day been issued to P. L. S. E. R. Jones, of Sarnia, to survey and establish the first concession line of the North Gore of the Township of Chatham, and to plant permanent monuments therein.

Mr. Edward Robert Jones, the surveyor, designated in the above letter, was called and he proved that he received the instructions mentioned in the letter from the Crown Lands Department; that he made the survey as directed (of his proceedings upon which he gave precise details); that he planted stone monuments as directed, and that he forwarded to the Government a plan of the survey and his field notes, accompanied by his report, which was as follows, addressed to the Commissioner of Crown Lands:

"Sarnia, 28th November, 1863.

"Sir:—I have the honor to forward for your approval, my plan, field notes, &c., of the survey of the line between the first and second concessions of the North Gore of the township of Chatham. You will perceive by the field notes that the position of the posts between lots 21 and 22 was disputed. The error has evidently arisen from the party mistaking the side for the centre of the road, as will at once be seen by the courses marked on the plan between the original remaining undisputed boundaries, and I have established the line accordingly.

(Signed) E. R. JONES."

The certificate of the Commissioner of Crown Lands, approving of the survey, and authorizing payment therefor, in accordance with the provisions of sec. 10 of 22 Vic. ch. 93 (Statutes of U. C.), addressed to the Treasurer of the County, was then proved, and was as follows:

“Department of Crown Lands, Quebec, 15th Sept., 1863.

“I certify that the survey of the first concession line of the North Gore of the township of Chatham, performed by Provincial Land Surveyor E. R. Jones, under instructions from the Department, bearing date the fourteenth day of August, 1863, and issued in conformity with the provisions of the Act passed in the 22nd year of Her Majesty's reign, entitled “An Act respecting the survey of lands in Upper Canada, upon the application of the Corporation of the County of Kent to His Excellency the Governor General, bearing date the 7th day of August, 1863, has been performed in conformity with the said instructions and to my satisfaction; and I do therefore, by virtue of the power vested in me by the 10th section of the said Act, order that all expenses incurred by the said Provincial Land Surveyor, E. R. Jones, in performing the said survey, be paid by you to him accordingly.”

(Signed) WM. McDougall,
Commissioner of Crown Lands.”

It was further proved that prior to the petition being presented to the Council, almost all of the original posts planted on the concession line had many years previously been removed and destroyed by lumbermen, and that different surveys had been made for the purpose of trying to trace the original line; and finally, it was proved, on the part of the prosecution, that taking the line as surveyed by Edward Robert Jones to be the correct line, the defendant's fence, which was the nuisance complained of, encroached on the concession line about forty-four links.

It was not disputed at the trial, as a matter of fact, that the petitioners to the Council constituted the required number of resident landholders interested in the matter

designated in the Act; nor that, if the survey by E. R. Jones was authorized, he conducted it in the manner directed by the Act; but at the close of the prosecution counsel for the defendants objected that the petition was not in accordance with the provisions of ch. 93 of the Consolidated Statutes of Upper Canada: that the case stated in the petition did not bring it within the Act: that the petition did not allege that the petitioners were residents: nor did it allege the want or obliteration of the original line or pray for placing of monuments: nor did it allege that the petitioners were a majority of the parties interested: and so that the survey of Edward Robert Jones was unauthorized.

The learned Judge reserved this question of law for the consideration of the Court.

The defendants then called witnesses, and among others Mr. Arthur Jones, a Provincial Land Surveyor, who made a survey of part of the line, including the spot where the obstruction complained of was. He produced no instructions explaining the object of his survey, nor any plan or notes of the survey. At the close of the defendants' case, as it appeared to the learned Judge that the evidence shewed that Mr. Arthur Jones had fallen into an error which led him astray at the spot where the obstruction was, which error Mr. E. R. Jones had avoided, and that the evidence seemed to establish that Mr. E. R. Jones had in fact on his survey discovered the true site of the original line, it was left to the jury to say whether, irrespective of the authority under which Mr. E. R. Jones's survey was conducted, they were of opinion that the line, as said to have been run by Mr. Arthur Jones, was on the line of the original survey or not, or whether they thought that the line run by Edward Robert Jones was on the line of the original one.

The jury found "that Arthur Jones's survey was more in accordance with the old blazed line originally surveyed. The verdict was taken for the Crown, subject to the opinion of the Court upon the points of law raised, as to the

sufficiency of the authority, under ch. 93 of the Consolidated Statutes of Upper Canada, for the survey made by Edward Robert Jones. If, upon consideration of the objections raised by counsel for the defendants, the Court should be of opinion that the survey was authorized by the Act, the verdict for the Crown was to stand; if, on the contrary, it was not authorized, then the verdict was to be entered for the defendants.

A. Prince, for the Crown, cited C. S. U. C. ch. 93, secs. 6, 14.

McCrae, contra, cited *Cooper v. Wellbanks*, 14 C. P. 364; *Tanner v. Bissell*, 21 U. C. 553; *Scott v. Corp. of Peterborough*, 25 U. C. 453; *Scott v. Corp. of Harvey*, 26 U. C. 32.

GWYNNE, J., delivered the judgment of the Court.

It was not disputed that, in fact, the petitioners to the County Council constituted the necessary number of resident landholders required for the purpose of procuring a binding survey to be made under the Act; but Mr. McCrae contends that the application to the Council of the parties requiring the survey to be made should shew on the face of it sufficient to warrant the survey being made under the Act. The contention is, that, although all the conditions, the existence of which call for the survey, do in fact concur, a survey will not be authorized as being under the Act, unless they are stated in the petition, and he cites four authorities, which, as he contends, support his view; namely, *Tanner v. Bissel* (21 U. C. 553); *Cooper v. Wellbanks* (14 C. P. 364); *Scott v. The Corporation of Peterborough* (25 U. C. 453); and *Scott v. The Corporation of Harvey* (26 U. C. 32). The two latter cases have no bearing upon the present case. They were applications for quashing By-laws for payment of the expenses attending a re-survey of an entire township, which, it may be conceded, without prejudice to the case before us, would not be a survey contemplated or authorized by the Act. In *Cooper v. Wellbanks* it was proved in evidence that the application was

not made by one-half of the resident landholders; that of the ten persons, who signed the application, one-half had no deeds for their lands. The resolution of the Council, passed upon this application, purported to be in pursuance of a different Act, namely, 18 Vic. ch. 83, sec. 8, the language of which seems to require that the resolution should contain allegations not required by 22 Vic. ch. 93, sec. 6. Moreover, the resolution purported on the face of it to proceed upon the petition of a majority of "householders," and not "freeholders," as required by the Act; so that not only did the resolution of the Council invalidate itself, but it was proved in fact in the case that the necessary number of freeholders, as required by the Act, were not applicants for the survey.

The observations of the learned Judge, who delivered the judgment of the Court, appear to me to have a strong bearing against the contention of the defendants in the case before us. He says: "When a survey of this kind has been performed the Court will presume that everything which was done had been done rightly until the contrary shall appear. Here we have before us evidence to shew that the application for this survey was made not by one-half the resident landowners to be affected by the survey, but by ten freeholders, over half of whom had no deeds for their lands, and that eleven or twelve freeholders, who would be affected by the survey, were not parties to the application."

This language, as it appears to me, lays down a correct principle, which, being applied to the present case, is conclusive against the contention of the defendants, namely, that everything is presumed to be done correctly until the contrary be established; and here it is established, and not disputed, that the necessary number of persons required by the Act to be applicants were the applicants for the survey. But, it is said, the petition to the Council does not shew any want or obliteration of the original survey, and that neither the petition to the Council nor the memorial to the Government prays for placing monuments. The petition to the Council, however, does sufficiently, I think, allege that the parties in the concession are suffering great inconvenience

from not knowing where to lay out their public money by reason of their inability to determine the site of the concession line, and that no final adjustment can be brought about other than is provided by 12 Vic. ch. 35, which is the Act consolidated in 22 Vic. ch. 93, and they pray the Council to procure action to be taken under that Act.

The memorial to the Government correctly, as I think, extracts the substance from this petition, when it says that over two-thirds of the freeholders, &c., have petitioned the Council for a survey to be made to clear up a doubt that exists as to a site of the concession; and the memorial, referring to the 12 Vic. ch. 35, and accompanied by a copy of the petition to the Council, prays His Excellency to be pleased to order that the said line be surveyed. I cannot read these documents in any other sense than as containing an application to the Governor requesting that a survey may be made under the provisions of the Act, namely, 22 Vic. ch. 93; and if to be made under the Act, then I consider the placing permanent stone boundaries under the direction and order of the Commissioner of Crown Lands, in the manner prescribed by the Act, is an incident to the survey which is necessarily involved in the application for the survey.

That there was a necessity for the survey, arising from the obliteration of the original line, caused by the removal of the original posts over the greater part of the line, sufficiently, in my opinion, appeared in the evidence; but the only point before us is, whether these matters should all be stated in the petition, and I cannot concur in holding that they should or must to any greater extent than does appear in the official documents here produced. I cannot concur in embarrassing the proceedings of these municipal bodies with those technicalities, which in modern times the Legislature has interposed to remove from our legal proceedings, and which were so long a reproach to the administration of justice.

In *Tanner v. Bissel* the surveyor, instead of proceeding as the Statute directs, made the object of the survey to be

to trace a formerly surveyed line. Here no question of that kind arises, for there is no dispute as to Mr. E. R. Jones having pursued the directions of the Statute; and, although the result of the survey has been, as I have no doubt it has been, to place the concession line almost on the very site in which it was originally placed, that may establish the accuracy of the original survey, but cannot vitiate his survey made under the Act. I am of opinion, therefore, that the verdict for the Crown should stand.

Judgment accordingly.

TAYLOR ET AL. V. AINSLIE.

Chattel mortgage to agent—Repudiation by principal—Intervening execution—Priority—Sufficiency of affidavit.

H. and I. being indebted to a certain Bank, arranged with the plaintiff, Taylor, the Bank's agent at H., where the debt arose, that, in order to secure the same, a chattel mortgage should be given to him and the other plaintiff, the Bank's General Manager in Canada. Taylor had no express power to bind the Bank to take this security, and his co-plaintiff was at the time absent from the country and ignorant of the transaction. A mortgage was accordingly drawn up, dated 22nd June, 1867, and purported to be made between H., I. and S., of the first part, and the plaintiffs, as trustees for the Bank, of the second part, reciting that the parties of the first part were indebted to the Bank in certain bills of exchange, and witnessing that H. in consideration, &c., assigned to plaintiffs certain household furniture *in his residence*, with proviso that the mortgage was to be void on payment by parties of the first part of the bills of exchange. On the Court of Directors in England being apprised of the transaction both by Taylor and by his co-plaintiff, in a report made to them by the latter in condemnation of it, they at once repudiated it, and on 22nd August following wrote Taylor distinctly to that effect; and when their letter reached him, on 5th September, the goods were still in Hill's possession, and nothing had been done under the mortgage beyond recording it. On 7th September Taylor resigned his position in the Bank, and on 16th September defendant's execution against the goods of Hill and Irvine was placed in the Sheriff's hands. In the following October the Bank instructed Taylor's successor to realize the security:

Held, that the Bank, by their repudiation of the mortgage, had let in defendant's execution, and that and their subsequent ratification of Taylor's acts and adoption of the security could not defeat the writ.

The affidavit annexed to the chattel mortgage was made by Taylor, who swore that H., I. and S., "the mortgagors in the above bill of sale, by

way of mortgage, named, are justly and truly indebted to me this deponent and Thomas Paton, as Trustees for * * * in the sum, &c.; that said bill of sale was executed in good faith and for the express purpose of securing the payment of the money so justly due as aforesaid, and *not for the purpose of protecting the goods and chattels mentioned in the bill of sale by way of mortgage against the creditors of the said H., I. and S., the mortgagors therein named, or preventing the creditors of the said mortgagors from obtaining payment of any claim against them*" :

Held, following *Fraser v. Bank of Toronto*, 19 U. C. 381, that the affidavit was sufficient.

Quære, per Gwynne, J., whether the mortgage in question could be said to be within the Statute at all, having been taken without the assent of the Bank, to whom the debt intended to be secured was due, and whether such a debt could, within the meaning of the Act, warrant an unauthorized and self-constituted trustee for the creditor in making the necessary affidavit, that the mortgagor was justly and truly indebted to him, so as to comply with the provisions of the Statute.

Interpleader issue to try if goods seized by Sheriff on *fi. fa.*, tested and received 16th September, 1867, in suit of Ainslie (the now defendant), against R. A. Hill and William Irvine, were the property of the now plaintiffs as against the now defendant.

The case was tried at Hamilton, before Morrison, J.

The plaintiffs put in evidence a chattel mortgage, dated 22nd June, 1867, between R. A. Hill, William Irvine and John Smith, of the first part, and the plaintiffs, trustees of the Bank of British North America, of the second part, in which, after reciting that the parties of the first part were indebted to the Bank upon the bills mentioned in the schedule annexed, (described as two bills of exchange drawn by Smith on and accepted by Hill, and endorsed by Irvine, for \$1300 and \$1200, due June 23, 1867), and had at the Bank's request agreed to secure the payment of the said debt in manner thereafter mentioned, it was witnessed that Hill, in consideration, &c., &c., assigned to plaintiffs the goods and chattels set out in the annexed schedule (described as household furniture in Hill's residence); Proviso: to be void on payment by the parties of first part of the bills of exchange and interest; covenant by all the parties of the first part, to pay the bills, and if they should attempt to sell, &c., the goods, or remove them from Hamilton without consent, then plaintiffs to enter and

seize, &c., and in default to sell the goods, [and after payment of the debt and interest, &c., to refund surplus to the parties of the first part.

The affidavit was made by plaintiff Taylor, dated 26th June, 1867. He swore that Hill, Irvine and Smith, "the mortgagors in the above bill of sale, by way of mortgage, named, are justly and truly indebted to me, this deponent, and thomas Paton, as Trustees for the Bank of British North America, in the sum of \$2500 ; that said bill of sale was executed in good faith and for the express purpose of securing the payment of the money so justly due as aforesaid, *and not for the purpose of protecting the goods and chattels mentioned in the bill of sale by way of mortgage against the creditors of the said Robert A. Hill, William Irvine and John Smith, mortgagors, therein named, or preventing the creditors of the said mortgagors from obtaining payment of any claim against them.*"

Hill proved the debt due the Bank by himself, Irvine and Smith, and that he was the owner of the goods in the mortgage, and which were in question in the cause.

It appeared from the evidence that Hill and Irvine owed the Bank over \$40,000 ; that there was a grain warehouse standing in the name of Hill, but wholly or partly under Irvine's management ; that on 18th June, 1867, plaintiff Taylor, then the Bank Manager at Hamilton, became aware that for certain warehouse receipts signed by Hill there was not grain to answer, and Hill stated that he gave the receipts in blank to Irvine to deal properly with them, and that he was willing to assign to the Bank all his property to secure the claim, and an offer was made to do so by Hill and Irvine, and the question was (as Taylor stated) what course the Bank would take as to criminal proceedings. Taylor said he should like to refer to the Bank officers in Montreal, but he was told there was no time to consider, that Irvine was outside awaiting his determination, and that if there was any hesitation in accepting his offer "he would make away with himself." Taylor said he thought it his duty, on reflection, to stipulate that no

criminal proceedings should be taken; but, although he was not to do so, he was to get the security; that he supposed if they left the country, he might not be able to get all the securities; that he therefore made the stipulation, and in pursuance of the arrangement got the chattel mortgage. On 28th June he advised the head office of it. On the 5th September he received the letter produced, dated London, 22nd August, 1867. The letter was to the effect that the Court of Directors, having considered the transactions with Hill and Irvine, as reported by Taylor, and in their General Inspector's report of July 15, expressed their unqualified disapproval of his having condoned the gross fraud committed by these parties on the Bank, had instructed their General Manager to repudiate the arrangement Taylor had made, if possible so to do, and to prosecute the parties to the fraud. He said nothing more had been done up to the receipt of that letter, except registering the mortgage. Irvine remained a long time after this letter was received and no proceedings were taken against him. Taylor resigned his situation on 7th September.

The other plaintiff (Paton) was in England when the mortgage was taken, and knew nothing of it. Taylor had no instructions countermanding this repudiation.

The new Manager (Anderson) swore that instructions were sent from London to realize these securities, dated October, 1867.

Hill was recalled, and swore that he did not give the chattel mortgage or other securities to prevent any criminal proceedings against himself, but for his personal liability; but that Taylor told him before they were executed what he had arranged with Irvine.

For the defendant it was objected—

1st. That the affidavit was insufficient, in stating a debt due the plaintiffs when it was due to the Bank.

2nd. That the affidavit was that Hill only was the mortgagor, and that the oath was that the bill was not executed to protect, &c., against the creditors, not of Hill, the mortgagor, but of Hill, Irvine & Smith, the mortgagors;

that the defendant Ainslie was a creditor only of Hill, and that the oath only pointed to creditors of the three jointly.

3rd. That the Bank having repudiated the arrangement and security, when defendants' execution was given to the Sheriff, the bill of sale was no bar.

4th. To the same effect, and that plaintiff Paton was ignorant of the trust.

5th. That the promise not to prosecute for the misdemeanour, being part of the consideration, avoided the mortgage.

The learned Judge overruled the objections, directing a verdict for plaintiffs, with leave to defendants to move to enter verdict for Hill, if the Court should think a verdict should have been directed for defendant, and that plaintiffs were not entitled to recover.

The jury found for the plaintiffs.

In Easter Term last *Freeman*, Q. C., obtained a rule *nisi* on the leave reserved.

Craigie now shewed cause, citing *Fraser v. Bank of Toronto*, 19 U. C. 381; *Shep. Touch.* 98; *Regina v. Blake-more*, 14 Q. B. 544; *Regina v. Hardy*, 14 Q. B. 529; *Keir v. Leeman*, 6 Q. B. 544, S. C. 9 Q. B. 371.

McKelcan, contra, cited *Boulton v. Smith*, 17 U. C. 400, 409; *Robinson v. Patterson*, 18 U. C. at p. 57; *Turner v. Mills*, 11 C. P. at p. 366; *Smith v. Stuart*, 12 Gr. 246; *Siggers v. Evans*, 5 E. & B. 367; *Harland v. Binks*, 15 Q. B. 721; *Townson v. Tickell*, 3 B. & Al. 31; *Maulson v. Toppin*, 17 U. C. at p. 183; *Doe Chidgey v. Harris*, 16 M. & W. at p. 520, 521; *Collins v. Blantern*, 1 Sm. L. C. 325.

HAGARTY, C. J.—If the three parties of the first part in the bill of sale can be considered “mortgagors,” then the affidavit complies literally with the Statute, and the case of *Fraser v. Bank of Toronto* (19 U. C. 381) is in plaintiff's favour. There two persons, McDermott and Walsh, partners in business, made the bill of sale, mortgaging

various properties, part their joint estate and part separate property of each. The affidavit was similar to that now before us, and the objection was that it should have stated the creditors of the said mortgagors, "or any or either of them," or to prevent such creditors, or any "or either of them" from recovering, &c. The Court held the affidavit sufficient. They said the Legislature did not think it necessary to add the words "or either of them" after the word creditors. * * They assumed that on general principles of construction, these words would be implied, on the maxim that "*omne majus continet in se minus*." We should not add to the requisitions made in the Statute, and hold a deed void which may have been perfectly just and honest, because the affidavit for filing does not contain some statement which the Statute does not enact."

It would have been more correct, no doubt, to have required the addition of these words, "or either of them," and the case before us seems specially to require it.

If this bill of sale had made the three debtors granting parties, stating the property mortgaged to be their property, that would not alone prevent the property described in the schedule as in Hill's dwelling-house from passing. Irvine and Smith would have no estate in the property mortgaged; but on the face of the deed they would be mortgagors, and the affidavit would then be sufficient on the case cited.

The mortgage says that the three parties of the first part "have agreed to secure the payment of their said indebtedness in manner hereinafter mentioned, &c." Then Hill alone assigns the property, with proviso to avoid the deed if *they* pay the money; and in a subsequent part it is provided that, on sale by mortgagees, the surplus, if any, is to be paid unto the three parties of the first part; and certain covenants speak of *their* attempting to sell or dispose of the goods or remove them from Hamilton, and that the mortgagees may hold without any interruption, eviction, molestation or hindrance, "of the said parties of

the first part." The granting party is Hill only, yet the rest of the deed is not inconsistent with the idea of Smith and Irvine having some unexplained interest in the goods, or, at all events, in the proceeds of the sale.

The three parties are called "mortgagors" for the first time in the affidavit; but they are named also whenever the word is used.

I hesitate to yield to the objection. Substantially the case is like that cited. Thus, McDermot & Walsh, the mortgagors, might have separate creditors, and an affidavit, speaking of the "creditors of the said mortgagors," would be open to objection by a separate execution creditor of one of them, that his claim was not sufficiently pointed at, just as is urged here by Hill's separate creditor.

Once it is established that "the creditors of said mortgagors" includes the creditors "of any or either of them," a large portion of the substance of the present objection disappears, and the question is narrowed down to the point, whether calling Hill, Irvine and Smith mortgagors, when only one of them conveys anything by way of mortgage defeats the security. I am inclined to think that the affidavit may be upheld on the principle laid down in the case cited.

These three persons are the formal parties to the mortgage: they are the parties indebted, who propose to give security, and to whom the surplus of the property, if sold, is to be paid. I do not think it was necessary to have used the word "mortgagors" in the affidavit, and had it merely said the creditors of said Hill, Smith & Irvine, the objection would have been less apparent: as it stands, I think, though not without hesitation, that it may be upheld.

When this chattel mortgage was executed one of the mortgagees (Paton) was absent from the country and knew nothing of it. Neither he nor Taylor had any personal interest: they professed to act merely as trustees for the Bank, to whom the money was due. Taylor had not any express power to bind the Bank to take this security, and whatever power they had to ratify and accept his act for

their benefit, I think it must also have been in their power to repudiate his authority. Paton could also refuse the trust, and could disclaim any benefit or estate under it.

It seems very clear that, as soon as the Court of Directors received Taylor's account of what he had done, they distinctly repudiated his act and gave instructions to prosecute the parties to the alleged fraud. They speak both of his letter of June 28 and of a report made to them by their General Manager of July 15.

When this emphatic repudiation reached Taylor, the goods were still in Hill's possession, and nothing had been done under the mortgage beyond recording it.

On the 7th September Taylor resigned his appointment in the Bank, and on 16th September defendant's execution was placed in the Sheriff's hands.

We have to consider how the rights of the parties to this issue stood on that day. Was there any valid instrument in existence vesting the property in Hill's goods in the plaintiffs, to prevent the operation of defendant's execution?

The repudiation of Taylor's arrangement to secure the Bank, the creditors of Hill, was then in full force; the creditor, for whose sole benefit the security existed, disclaimed any interest under it; one of the trustees, the General Manager of the Bank, was not originally consulted as to acting, and before that time had made a report to the Bank, on which they acted in refusing the security.

I am unable to see how on the 16th September the bill of sale can be held to defeat the operation of defendant's execution.

But it is urged that the Bank afterwards ratified Taylor's acts and adopted the security, making it valid from the beginning. I see a great difficulty in acceding to this argument.

The doctrine of ratification is not without important qualifications. In *Bird v. Brown* (4 Ex. 786) the subject is fully discussed. Goods were in transit from New York to Liverpool when the English consignees became bankrupt.

A Liverpool firm, to protect the consignor's interest, stopped the goods *in transitu* on their arrival in the Mersey. This was done without the knowledge of, or authority from, the New York consignors, but claimed to be on their behalf. The assignee of the bankrupt consignees (plaintiff in the suit) then formally demanded the goods from the agents (the defendants), and delivery was refused. This was on May 12th. On the next day one Hubback, the then duly authorized agent of consignors, ratified and confirmed all done by the defendants, and the consignors, on hearing of the stoppage and adoption, and long before suit commenced, ratified and adopted both the stoppage and adoption. The assignee of consignees brought trover. The authorities are reviewed, and Rolfe, B., gave the judgment of the Court:—"But this doctrine (of ratification, relating back) must be taken with the qualification that the act of ratification must take place at a time and under circumstances *when the ratifying party might himself have lawfully done the act which he ratifies*. Thus, in *Lord Audley's case*, a fine with proclamation was levied of certain land, and a stranger, within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, and not before, the party who had the right to the land, ratified and confirmed the act of the stranger. This was held to be imperative, though such ratification within the five years would probably have been good. And the principle of this case, which is reported in many books, and is cited with approbation by Lord Coke in *Margaret Podger's case* (9 Rep. 104) appears to us to govern the present. There the entry to be good must have been made within the five years. It was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine. By the ratification it became the act of the party in whose name it was made, but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and he did not ratify it till it was too late to do so. In the present case the stoppage could only be

made during the *transitus*. During that period the defendants, without authority from Illius (the consignor) made the stoppage,—after the transaction was ended, but not before Illius ratified what the defendants had done. From that time the stoppage was the act of Illius, but it was then too late for him to stop. The goods had already become the property of the plaintiff, free from all right of stoppage.”

This case is cited and the principle stated in *Broom's maxims*, page 779.

There is also a class of cases, such as *Siggers v. Evans* (5 E. & B. 367) and *Harland v. Binks* (15 Q. B. 713), illustrative of the doctrine of the deed being revocable until actually assented to by one or more of the persons for whose benefit it was made.

Maulson v. Topping (17 U. C. 183) is to the same effect.

As to the manner in which the benefit under a deed may be disclaimed, Lord Campbell, in his judgment in *Siggers v. Evans*, quotes *Buller and Baker's case* (3 Rep. 25a, 26b): “The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested.”—See *Hill on Trustees*, 224.

It seems to me that, as soon as the Bank distinctly repudiated the security taken on Hill's goods, the latter could have lawfully disposed of them, and his vendee's title could not be divested or disturbed by the Bank afterwards resolving to adopt the rejected security. The law laid down so clearly in *Bird v. Brown* seems very applicable here. The intervention of defendant's execution on 16th September, while the Bank's repudiation was in full force, seems to me to destroy the effect of any subsequent adoption. The right of property must be taken as it stood on the delivery of defendants writ to the Sheriff. The chattel mortgage was in my judgment not then a binding security.

This case is not embarrassed by any question of time being given or privilege accorded to Hill, the grantor. The only condition in the mortgage was to pay the bills of

exchange mentioned in the schedule according to their tenor.

On this ground I think the rule to enter a verdict for defendants, on the leave reserved, should be made absolute.

If my decision were to depend on the remaining point, as to the mortgage being void, because part of the consideration was the stipulation not to prosecute for the misdemeanour, in issuing false warehouse receipts, I should decide that the case must be submitted to the jury on that question; and if the jury should find that such a stipulation did form part of the consideration, it would remain to be considered whether the execution creditor could avail himself of the objection. As to these points we desire to be understood as expressing no opinion.

Taylor's evidence is strong in support of defendant's contention. Hill swears that he did not give the mortgage to prevent any criminal proceedings against himself, but for his personal liability to the Bank. I am not authorized to draw any inferences, and would require the finding of a jury for my guidance. The law on this point is fully discussed and settled by the House of Lords in *Williams v. Bayley* (L. R. 1 E. & I. Appeals, 200). I express no opinion on the effect of the evidence on this point; in any event, as already remarked, the opinion of a jury should be taken upon it.

GWYNNE, J.—It may, perhaps, be open to question whether a mortgage, taken as this appears to have been, can be said to be a mortgage within the Statute at all; whether the meaning of the Statute is not that, to make a mortgage good under the Statute, the assent of the mortgagee, meaning thereby the person to whom the debt intended to be secured is due, must be had at the very moment that the mortgage is executed. An agent taking a mortgage for his principal, in order to make the affidavit required by the Statute, must have been authorized in writing to take the mortgage, and a copy of such authority must be registered with the mortgage.

If, then, an agent cannot without written authority take a mortgage, so as to enable him to make the necessary affidavit, it may be contended, and, perhaps, reasonably, that an agent, having no such authority, cannot, by making himself a trustee and calling himself mortgagee in the instrument, qualify himself to make the necessary affidavit and so make the instrument perfect.

The amount intended to be secured by this instrument, as the instrument itself shews, was a debt due to the Bank. They were the creditors. It may be strongly urged that such a debt cannot, within the meaning of the Act, warrant a person, who without authority constitutes himself a trustee for the creditor, in making the affidavit required by the Statute, that the mortgagor is justly and truly indebted to him, so as to comply with the provisions of the Statute; but, as in this case we come to the conclusion that on the 16th day of September, 1867, the instrument was not, by reason of the repudiation of the Bank, a valid subsisting security, to cut out the execution creditor, I do not desire to be understood as having formed a conclusive opinion upon the point: I only allude to it as one open to an argument, to the force of which the inclination of my mind at present is to yield.

J. WILSON, J., concurred.

Rule absolute to enter verdict for defendants.

CASEY v. MCCALL.

Action for purchase money of land—Account stated—Plea of payment—Receipt under seal—Estoppel.

Plaintiff sold and conveyed to defendant certain land, the deed containing a receipt for the purchase money, \$800, with a receipt for the purchase money also indorsed. Plaintiff then sued defendant upon the common counts for the purchase money of the land, and on an account stated. The defendant pleaded, among other pleas, payment.

After the sale defendant told one M. that he had only paid plaintiff \$41, and offered to pay him (M.) whatever plaintiff was willing he should. It also appeared, though not very clearly, that plaintiff was present at this conversation:

Held, following Sparling v. Savage, 25 U. C. 259, that the plaintiff was concluded by the receipt in the deed, and that he could not recover on either counts.

Quære, whether the conversation between defendant and M. amounted to a statement of account, or anything more than an admission from which non-payment of the purchase money might be assumed.

Delaration for money payable for a messuage and lands sold and conveyed by plaintiff to defendant; common money counts and accounts stated.

Pleas—Never indebted, payment and set off.

The case was tried at Lindsay before Smith, County Court Judge. It was opened as a claim for \$800, price of land sold by plaintiff to defendant.

A deed was produced by defendant McCall, dated 19th August, 1861, consideration \$800, alleged in the deed as in hand paid at the sealing and delivery of the deed, the receipt whereof was thereby acknowledged in the usual form, and a receipt for the purchase money was indorsed.

The plaintiff was represented to be a discharged soldier, poor and old. One Morton proved that when plaintiff sold his land he owed witness about \$140 for his board. Three or four months after the sale witness talked to defendant about it, when defendant said he would pay witness whatever plaintiff was willing or content he should pay: said this several times. It was on account of getting the plaintiff's property. It was understood, he said, that he (defendant) had only paid about \$41 on it at the time. It was a note given by plaintiff to witness that defendant was to pay. It

would seem, though not very clearly, that plaintiff was present at this conversation.

Leave was reserved to move to enter a nonsuit on the objection that the receipt of the money stated in the deed was a complete answer. It was left to the jury to say if the purchase money had been paid or not. They found for plaintiff \$759.

S. Smith, Q. C., obtained a rule to enter nonsuit on the the leave reserved.

H. Cameron, shewed cause, citing *B. & L. Prec.* 214; *Shaw v. Ross*, 20 U. C. 262; *Sparling v. Savage*, 25 U. C. 259; *Tay. Ev.* 112.

A. N. Richards, Q. C., contra, cited *Ketchum v. Smith*, 20 U. C. 313.

HAGARTY, C. J., delivered the judgment of the Court.

Sparling v. Savage (25 U. C. 259), following *Ketchum v. Smith* (20 U. C. 313), is conclusive against the plaintiff's right to recover in such a case on the count for the price of the land, or the common money counts, on payment pleaded; that the deed acknowledging the payment of the purchase money was conclusive evidence under the plea of payment, and that no estoppel need be pleaded. So far the point is not open to further argument. But the plaintiff here urges that he can recover as on an account stated, and that the fact of the money not having been paid would be a good consideration for a promise to pay.

It may well be doubted if the evidence of the conversation proved here by Morton could possibly amount to a stating of an account. The evidence would, perhaps, at the most shew an admission from which the actual non-payment of the money might be assumed. A direct declaration by defendant that he had not paid any part of the purchase money would not amount to a statement of account and promise to pay. The evidence is merely that he said he was willing to pay the witness Morton whatever plaintiff wished him to pay.

Assuming, however, that the evidence established an account stated, it is not easy to see how plaintiff can recover. If the plea of payment be conclusively proved by the statement of payment in the deed, is it not equally well proved as to payment of the money stated in the account? As Alderson, B., says in *Thomas v. Hawkes* (8 M. & W. 140), "It cannot be contended that, from the mere statement of an account, a debt arises. The averment is not merely that an account was stated, but that defendants were indebted on an account * * They were entitled under the general issue to shew that the account did not shew them to be indebted, because it was not correct. * * The issue is not simply whether there was an account stated or not, but whether the defendants *were indebted* on an account stated or not."

As said in *Sparling v. Savage*, "if there were a good consideration on the account stated there would also be a good one on the common counts. It all seems to revert to the single point, was the money paid or not?"

Cocking v. Ward (1 C. B. 858) supported the account stated on a wholly different ground. Plaintiff had given up his tenancy of some land to defendant, and he was put in her place in consideration of his promise to pay her £100. After he was placed in possession and obtained the full benefit of the bargain, which being without writing could not under the Statute of Frauds be enforced, he was asked to pay, when he admitted his liability and asked for time, which was granted. Tindal, C.J., says: "After the debt has formed one item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise. * * We think the principle applies to cases where the only objection is, that the original debt might not have been recoverable from the deficiency of legal evidence to support it." To make this case like the one in judgment, there should have been a deed transferring the interest in land, reciting

the payment of the £100. If defendant had subsequently said, "I admit I never paid you the £100, though you are conclusively stopped from saying I did not pay you," it does not seem to us that he should be held liable at law.

Middleditch v. Ellis (2 Ex. 623) was an action on an account stated. A sum of money was secured by a mortgage, with power of sale. Afterwards plaintiff sold the land, and the account of the sale, which defendant admitted to be correct, shewed a deficiency of £ and defendant promised to pay the balance. Rolfe, B., gave the judgment: "The defendant is charged with nothing but the money secured by the deed. There is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated: it is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable upon the deed. This does not entitle the plaintiff to proceed as on a new liability arising from an account stated."

See also *Clarke v. Webb* (1 C. M. & R. 29); *Petch v. Lynn* (9 Q. B. 147).

Rule absolute for nonsuit.

MORSE V. THOMPSON.

Verdict by mistake—Affidavits by jurors—Estoppel in pais—Misdirection—County Court Appeal—Exhibits not produced on Appeal—New trial.

The jury having agreed to render a sealed verdict, handed a letter under seal to the constable for delivery to the Judge, to whom it was taken at his residence. Upon opening and reading the enclosure, the Judge sent back a written memorandum that it would not do, and that they must find for either plaintiff or defendant. The jury then asked the constable which of the parties was plaintiff, and upon the Sheriff being communicated with by the constable, he wrote upon a piece of paper that Thompson, the defendant, was plaintiff, and one Wilmot defendant. This paper he took to the jury, and at the same time told them that Thompson was plaintiff, when a number of them said they would find for Thompson. Shortly afterwards a sealed letter was handed to the constable, to be delivered to the Judge, stating that they found for the plaintiff, and on being subsequently asked by the Judge in Court, they repeated that they found for the plaintiff. The constable swore that he believed they intended to give a verdict for Thompson, and the latter's attorney also swore, and was uncontradicted, that the first sealed letter stated that the deeds, upon which the plaintiff (Morse) rested his claim, were void : *Held*, reversing the judgment of the County Court, that the verdict could not stand, and a new trial was, therefore, ordered in the Court below. *Quære*, whether affidavits by the jury as to their mistake ought to have been received in the Court below.

The execution of the defendant in the issue (the execution plaintiff) being in the Sheriff's hands, the father of the execution debtor claimed the goods, whereupon the Sheriff was directed by the attorney of the defendant to withdraw, which he did. The plaintiff (the claimant in the issue) subsequently placed an execution in the Sheriff's hands against both father and son, when the former gave him a mortgage on the goods, which the son had assigned to him, and the plaintiff thereupon withdrew his writ, and several months afterwards the Sheriff again seized under defendant's writ. There was no evidence that defendant knowingly either did or said anything to induce plaintiff to alter his position. The jury were told that if defendant abandoned the seizure, and in consequence plaintiff withdrew his writ and took the mortgage, defendant was estopped from disputing the validity of the mortgage :

Held, a misdirection, and that there was no estoppel.

Where exhibits used in the Court below are not produced before the appellate Court, the appeal will not be heard, if the attention of the Court be called to the fact.

Appeal from the County Court of the County of Lambton, being an interpleader issue as to certain goods seized on 5th March, 1868, by the Sheriff on a *fi. fa.*, tested 29th May, 1867, on a judgment recovered by defendant Thompson against one E. Wilmot.

Plaintiff claimed under a mortgage dated 9th November, 1867, given to him by George Wilmot, who claimed under an assignment from Elias, his son, the execution debtor.

The jury retired after the trial, and a sealed verdict was agreed to be given, and finally a verdict was entered for plaintiff. According to the affidavits filed on the motion for a new trial, and not answered on plaintiff's part, it appeared (without referring to the affidavits of jurors) that the jury after being locked up gave the constable in charge a sealed letter for the Judge, which he swore he took to the latter, at his residence, who opened it and said that it would not do, and wrote on a piece of paper that they must find either for plaintiff or defendant. This paper the constable took to the jury, and one of them afterwards knocked for the constable and asked which of the parties was plaintiff. The constable swore he then went to the Sheriff, who looked at his book and wrote on a piece of paper that Thompson was plaintiff and one Wilmot defendant, which paper he took to the jury, and at the same time told them that Thompson was plaintiff, when a number of them said they would find for Thompson, and after a short time they handed a sealed letter to deponent to take to the Judge, saying they had found for plaintiff. The Judge on receiving it returned to the court house, and the jury being called in were asked if they had agreed to a verdict, when they said they found for plaintiff, intending, as the constable swore he believed, to find in favour of Thompson. No counsel was present when the verdict was given. It was sworn by defendant's attorney, and not denied, that the first sealed letter sent to the Judge stated that they found the deeds were void, that is, the deeds on which plaintiff's claim rested. Affidavits of two jurors, and a certificate of eleven, were offered in proof of their having made a mistake as to the plaintiff. The learned Judge, however, during the ensuing term, refused a new trial. No explanation or contradiction was suggested, on the argument of the rule, against the facts as above stated. The learned Judge, in his judgment, said that any other verdict than one for the plaintiff would have been perverse, and even if given mistakenly it should not be set aside.

The defendant appealed both on these grounds, and others mentioned in his rule, involving a complaint for mis-direction.

R. A. Harrison, Q. C., for the appeal, cited *Vasie v. Delaval*, 1 T. R. 11; *Cogan v Ebdon*, 1 Burr. 383; *Robarts v. Hughes*, 7 M. & W. 399; *Jamieson v. Harker*, 18 U. C. 590; *Ernest v. Browne*, 4 Bing. N. C. 162; *Doe Church v. Perkins*, 3 T. R. 749; *Bills v. Smith*, 12 L. T. N. S. 22; *Bank of Toronto v. McDougall*, 15 C. P. 475; *Bank of Montreal v. McTavish*, 13 Gr. 395.

Dr. McMichael, contra, cited *Burgess v. Langley*, 5 M. & G. 722; *Raphael v. Bank of England*, 17 C. B. 161; *Doe Hagerman v. Strong*, 8 U. C. 291; *Sanders v. Davis*, 16 Jur. 481; *Hawkins v. Alder*, 18 C. B. 640; *Strather v. Graham*, 4 M. W. 721; *Palmer v. Crowle*, Andr. 382; *Normun v. Beaumont*, Wills, 187, *Note*; *Best*. Ev. 3rd ed., 733; *Davis v. Taylor*, 2 Chitty, 268; *Clark v. Stevenson*, 2 Wm. Bl. 803; *Aylett v. Lowe*, 2 Wm. Bl. 1221; *Holloway v. Hewit*, Lofft. 232; *Anon*, Lofft., 521; *Jackson v. Williamson*, 2 T. R. 281; *Vasie v. Delaval*, 1 T. R. 11.

HAGARTY, C. J., delivered the judgment of the Court.

We think a verdict so entered ought not stand, and should have been set aside. The mistake made by the jury seems proved beyond question, on evidence not impeached in any way. Coupled with the alleged fact of their having first found that the deeds were void, it seems impossible to doubt that no such verdict as is now on record was ever intentionally rendered by the jury. Whether the verdict is in accordance with the merits or not, we think it ought not to stand under such extraordinary circumstances.

We do not rest our opinion on the affidavits of the jurymen, although they seem to have been received without objection in the Court below.

It is right that we should notice the facts in evidence. Thompson's writ against Elias Wilmot was received 29th May, 1867, and the Sheriff seized, and George Wilmot

the father, claimed the property. On the Sheriff applying for instructions to Thompson's attorney he was told to withdraw, which he did. On 3rd of October following a *fi. fa.*, at suit of Morse, the present claimant, was placed in the Sheriff's hands against both the Wilmots, and a seizure was made 15th October, 1867. It appeared that E. Wilmot went away in May, 1867, a good deal involved, and about that time sold or assigned the property to his father George Wilmot.

It then appeared that after the issue of Morse's writ against both the Wilmots, the father, George, mortgaged the property to Morse, who then withdrew his execution. In March, 1868, the Sheriff seized again on Thompson's writ, the property still remaining where it had first been. From June, 1867, to April 15th, 1868, one Garrick, who had previously worked for the son, swore that he held the goods (steam engines and machinery at some oil wells) from the elder Wilmot, who, as he understood, had bought from his son.

The jury were charged that, if Thompson abandoned the seizure, and in consequence claimant withdrew his execution and took the mortgage, he (Thompson) was then estopped from disputing the validity of the mortgage.

We do not see on the evidence that such an unqualified direction can be upheld. When Morse's writ came to the Sheriff, the seizure on Thompson's writ had been previously abandoned, apparently long before, and Morse knew of that fact; but there is nothing in the evidence, as reported to us, to shew that Thompson knowingly did or said anything to or with Morse to induce the latter to alter his position, so that it would be safe to apply the doctrine of estoppel *in pais* to him. On the information then before him Thompson was induced to withdraw his seizure, and not to enter into a law suit with George Wilmot; and his doing so might be naturally a matter of remark to a jury. But he may have received further and better information of the facts, or had altered his mind, &c., &c., when he determined to press his execution. All that can be said is, that at one time he declined contesting the claim made by George Wilmot; and

Morse's counsel might argue that, as he knew of Thompson's having so yielded to George Wilmot's claim, he (Morse) was quite safe in accepting a security from him, and abandoning the execution, which probably would have prevailed.

We think the rule to set aside the verdict and for a new trial should be made absolute in the Court below without costs.

We express no opinion on the merits of the case on either side. The jury might be misled by an express direction that a party is legally estopped from disputing a particular state of facts. The modern cases on estoppel *in pais* point out distinctly the manner and the care with which the doctrine should be applied.

The deeds produced, as exhibits at the trial, have not been produced before us. Had this been observed at the time, the Court would have refused to hear the appeal: as it is, we feel unable to notice more particularly some of the legal bearings of the case.

Appeal allowed.

WILSON V. BAIRD.

*Ejectment—Proof of title by plaintiff—Tenancy from year to year under—
Notice of intention to use probate of will good for any trial—Divisible verdict.*

Defendant having put plaintiff to proof of title, and taken exceptions thereto, cannot then set up a tenancy under him from year to year. A notice of intention to give a probate in evidence as proof of the will is available at any trial of the cause, and not merely at the first trial after the giving of the notice.

Where several plaintiffs claim jointly, but title is not proved in all of them, there will be a verdict for those plaintiffs who prove title, and for the defendant against the others.

Ejectment for lots 2 & 3, sec. O., Garrison Reserve, Toronto.

Plaintiffs claimed as devisees under the will of C. Widmer and an appointment thereunder.

Defendant denied plaintiff's title, and asserted title in

himself as tenant from year to year, which had not been determined by plaintiffs.

At the trial, before Gwynne, J., at the last York Spring Assizes, a notice under the Statute of intention to use "at the trial of the cause" the probate of Widmer's will as proof, instead of the will itself, was proved to have been given on 24th December, 1867.

There had been a trial at the Winter Assizes following said notice, and at the last trial in the Spring the same notice was relied on. This, however, was objected to as insufficient.

The will shewed a devise of these lots, in trust, to plaintiffs, Wilson, Dalton, and Robert Baldwin, who had died some years previously.

One Hawke, son-in-law of Widmer, proved that Widmer had possession of the premises, and he had been on them with him: that the house defendant occupied, called the Railway Saloon, was not then built: that witness had a power of attorney from the trustees, and thereunder executed a lease, produced, from plaintiffs to Samuel Baird, son of defendant, who entered into possession and died in the place. The lease described them as part of lots 2 and 3 in sec. O., Garrison Reserve.

It was objected for defendant, 1st. That there was no evidence of title in Widmer.

2. That the notice as to probate was not sufficient.

3. (Not noticed in argument).

4. No estate was shewn in plaintiff Beatty, or in the three plaintiffs jointly.

Defendant called his son, who proved that Samuel, the lessee, died in possession, in September, 1867, and defendant occupied after lessee's death, and paid rent to one Beekman.

It was then objected by plaintiffs that defendant, having put plaintiffs to proof of title, could not set up a tenancy.

Defendant urged that he wished to prove a tenancy from year to year under plaintiffs. The evidence was rejected. It was also urged that defendant should have a verdict

against plaintiff Beatty. Leave was given him to move on this, and a verdict was entered for plaintiffs Wilson and Dalton.

In Easter Term last *James Paterson* obtained a rule to set aside the verdict on all these grounds, to which *C. S. Patterson* now shewed cause, citing *Thompson v. Falconer*, 13 C. P. 78; *Houghton v. Thompson*, 25 U. C. 557; *Cartwright v. McPherson*, 20 U. C. 251.

Harrison, Q. C., contra, cited *Hunter v. Farr* 23 U. C. 324; *Greaves v. Hilliard*, 15 C. P. 326; *Lake v. Briley*, 5 U. C. 307; C. S. U. C. ch. 32, sec. 9; *Hope v. Beadon*, 17 Q. B. 509; *Young v. Scoble*, 10 U. C. 372; *Butler v. Donaldson*, 10 U. C. 643, 647, per Draper, C. J.; *McKinley v. Bowyer*. 11 U. C. 86; *Doe Wilton v. Beck*, 20 L. J. 67; C. S. U. C. ch. 27, secs. 2, 6, 15. 21; *Canada Company v. Wier*, 7 C. P. 341; *Shore v. McCabe*, 10 C. P. 26; *Colby v. Wall*, 12 C. P. 95.

HAGARTY, C. J.—We are of opinion that the probate was properly received in evidence under the notice given for the preceding Assize. The words of the Act are, “give notice to the opposite party ten days, at least, before the trial or other proceedings in which the said proof is intended to be adduced,” (U. C. Con. ch. 39, sec. 9). The notice here given was that the probate should be used “at the trial of this cause.” It is “for the trial generally,” and although given originally before the first trial, and no doubt designed for it, it was in fact given also ten days before the second trial, and we think it would be a most narrow and inconvenient construction to hold that the notice is exhausted by the first trial.

As to the proof of seizure we think there was evidence to go to the jury on Mr. Hawke’s testimony. The defendant did not ask to have it submitted to them as a question of fact, but contented himself with objecting there was no legal evidence. The witness said he knew the land; that Widmer had possession of the premises; and the first entry of the Baird family into it was under the lease proved,

from the plaintiff to Samuel Baird, for three years, who died in possession just as the lease expired, and defendant occupied after his death, but not, as far as the evidence went, on any independent right.

We think the learned Judge rightly refused evidence of a tenancy by defendant under plaintiffs from year to year, after putting them to full proof of title and taking all possible exceptions thereto. We cannot hold otherwise without overruling *Houghton v. Thompson* (25 U. C. 557), which is expressly in point. Here the defendant did not even abstain from questioning the title adduced by plaintiffs, but cross-examined the witnesses, and took all formal exceptions.

The remaining point is, that no title was shewn in plaintiff Beatty. The ejectment summons under the Statute claims title in the three plaintiffs, "or some or one of them," and under section 21 the question at trial shall be whether the statement in the suit of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part, &c., &c.

The three plaintiffs claim as devisees. Under the old system it would have been on a demise by the three, joining any other demises.

Sec. 43 provides that if one of several claimants desires to discontinue, the Court or Judge may, on such terms as seem fit, strike his name out of the proceedings, and the action shall proceed at suit of the other claimants, and sec. 77 gives Courts and Judges the same power over the proceedings under this Act as formerly exercised in the old action of ejectment.

We think that if plaintiffs had applied to the Judge at trial he would have struck out the name of plaintiff Beatty, and, if necessary, the notice of claim would have been amended, as this Court has recently held might have been done: *Chadsey v. Ransome* (17 C. P. 629). *Blake v. Done*, (7 H. & N. 465) is a strong case as to the power of amendment as to parties in ejectment. Had this course been taken it would have prevented any difficulty; but as, on

the authorities cited by my brother Gwynne, defendant is entitled to a verdict against plaintiff Beatty, we make his rule absolute to that extent on the leave reserved.

As he has failed on all the other grounds, there should be no costs to either party on the proceedings in Term.

GWYNNE, J.—The evidence of the witness Hawke, in the absence of all contradiction and of evidence of any possession in another, places it beyond doubt that there was evidence of seisin in Widmer.

The *ratio decidendi*, in *Hope v. Beadon* (17 Q. B. 509), is as applicable to a notice of intention to use the probate of a will as it is to a notice to produce, or a notice to admit, both of which, if given for one trial, are available for another. In *Elton v. Larkins* (5 Car. & P. 386) Tindal, C. J., says, "The former trial is deemed as no trial, and the new trial, being of the same cause, is therefore subjected to the same admissions." Indeed, the argument for the admission of a probate of a will at a second trial, upon the same notice as was given for a first trial of the same cause, seems stronger; for the object of the Statute is to dispense with the necessity of proving a will *per testes*, unless the case of the defendant is such as to require such proof: therefore the Statute gives him an opportunity, within four days after the receipt of such notice, to give a counter notice that he intends to dispute the validity of the devise, and if he fails to do so, he is deemed to convey that he has no intention to dispute, and he is excluded from disputing, the validity of the will: *Barraclough v. Greanburgh*, (L. Rep. 2 Q. B. 1). Having *once* in effect declared that his defence involves no question as to the validity of the will, and having excluded himself from questioning it, there can be no reason why the like effect should not be given to the one notice, whatever number of trials there may be of the cause.

Houghton v. Thompson (25 U. C. 557) is conclusive authority as to the propriety of the course pursued at the trial, of excluding defendant from entering into evidence of

tenancy under the notice of claim, That notice was of a claim as tenant from year to year, not determined by notice; yet throughout the whole course of the plaintiff's case he disputed the title of his landlord; he denied the seisin of the testator; he called for proof of his will *per testes*; and at the close of the plaintiffs' case, he insisted upon his right to nonsuit them; and even now he insists upon the same objections, and, while asking to be permitted to shew himself the tenant of the three plaintiffs, he asks that the verdict may be set aside and a new trial granted, because the three are joined as co-plaintiffs, and have not proved a joint title: he disputes to the last the title of his landlords.

Then, as to the verdict being rendered infavor of Wilson and Dalton. In *Butler & McNeil v. Anderson* (10 U. C. 647) Sir John Robinson, C. J. says: "I think we have no sufficient grounds for denying to the 7th clause (of 14 & 15 Vic. ch. 114) its obvious construction, and that in actions of ejectment now brought the verdict may be in favor of one or more of several plaintiffs." The Ejectment Act (22 Vic. ch. 27 sec. 2) says, "The writ shall state the names of all the persons in whom the title is alleged to be." Sec. 3 provides the form of the writ, which is set out in the form No. 1 in the Act, containing as follows, "to the possession whereof A. B. & C., *some or one of them*, claim to be entitled." This writ then contains full notice to the defendant, as it appears to me, that the claimants or plaintiffs (which words are indifferently used in the Statute to represent the same persons, as will clearly appear by reference to the clause entitled "Judgments," and to other parts of the Act) claim to evict the defendant, either by virtue of a joint title in all or in two of them, or a separate title in one or each of them; as, for example, in case three claimants be tenants in common, they recover in virtue of their several parts. The effect of this appears to me to be to place the action, as to the right to recover and hold a verdict, upon the same footing as a case of joint and several demises in the old form: *Elliss v. Elliss*, (2 El. B. &

El. 81). Then section 4 provides that "to the writ shall be attached a notice of the *nature* of the title intended to be set up ; as, for example, by grant from the Crown, or by a deed or lease derived from or under the grantee of the Crown, or by marriage, descent or devise, stating to or from whom, or by length of possession." Then by section 21 the jury shall find *which* of the claimants is entitled," establishing as it appears to me beyond doubt that one or more may recover; but in such case the Statute says nothing as to the right of the defendant to a verdict in his favor as against the claimant not succeeding. If several claim as heirs-at-law of A. B., and some establish their title and others fail, an event which may frequently happen under our law, which ignores the right of primogeniture, those proving their heirship would be entitled to recover, or there is no meaning in the form of writ given, or in the question which by the 21 section is directed to be submitted to the jury. So, in the case of devisees, there might be a question whether any estate passed to some under the will, or whether, if any, it be a legal or equitable estate, and if some or one only should be able to shew a devise of a legal estate, such person or persons would be entitled to a verdict and judgment for the whole or part of the land, as the case may be. Now, in the present case, the plaintiffs claim as devisees under the will of Christopher Widmer and an appointment thereunder. All or such of them as prove themselves to be devisees of that will are, in my opinion, entitled to a verdict and judgment. Wilson and Dalton establish that character ; but Beatty, the other plaintiff, for some reason, not having proved an appointment under the will, having the effect of making him equally entitled with the devisees, fails: such a case, as it appears to me, comes precisely within the Statute. Wilson and Dalton recover in right of the title asserted, namely, as devisees under the will of Christopher Widmer. Title under his will was the *only mode* in which title was set up, and so they have strictly complied with the requirements of the 5th section of the Act. They are, in my opinion, entitled to judgment in

their favor; but leave was reserved at the trial for the defendant to move to enter a verdict as against Beatty, which, as the other plaintiffs are entitled to the whole of the premises, can affect costs only, if the Court should be of opinion that he is entitled to such a verdict. *Doe Smith v. Webber* (2 Ad. & El. 450) decides that in the old form of action in ejectment a defendant, since the new rules, is entitled to a verdict and judgment for his costs, where the plaintiff failed upon one of several demises, although upon another he recovered the whole premises. This Court in *McNab v. Stewart* (15 C. P. 189) and *McBride v. Lee* (16 C. P. 317) has held that the verdict is divisible in ejectment, both as to the lands claimed and as to the parties to the suit. In accordance with these authorities the defendant is entitled to his costs, if he have any, against Beatty, separately, and pursuant to the leave reserved he is entitled to have the verdict altered accordingly; but, inasmuch as defendant fails upon all the other points moved by his rule, and which were the chief matters in contest, there should be no costs of this rule taxed to either party.

Rule accordingly.

GARNER V. COLEMAN.

Coroner—Arrest by—Trespass—Mala fides and want of reasonable and probable cause—Nonsuit—New trial.

Plaintiff sued defendant in trespass, stating that acting as coroner he assaulted plaintiff, &c. The 2nd count stated that defendant was acting as coroner, &c., and that, a jury being duly sworn, he held an inquisition on the body of one N. F., then lying dead, setting forth the finding of the jury, which shewed that deceased had died from the effects of laudanum administered according to a prescription by plaintiff, and through culpable negligence on his part in not having given sufficiently explicit directions, and charging that defendant maliciously and without reasonable cause issued his warrant for plaintiff's arrest and committal for wilful murder, on which plaintiff was arrested, &c.

At the trial, on its being objected that defendant, as coroner, was Judge of a Court of Record, and that no action would, therefore, lie against him for anything done in his judicial capacity, plaintiff proposed to shew that he had acted maliciously and was therefore not protected, but without suggesting in what particular he had so acted. It was not disputed, however, that defendant had acted within his jurisdiction and *super visum corporis*, or that he had issued his warrant on the finding of the jury. On this plaintiff was nonsuited :

Held, that as defendant was acting judicially, trespass would not lie against him; and that though the nonsuit did not appear so erroneous as to warrant its being set aside, still that if plaintiff desired to present facts to the jury not suggested to them at the trial, the Court would allow him to do so on payment of costs.

The first count of the declaration stated that defendant, acting as one of the coroners of the United Counties of Huron and Bruce, at Goderich, in said County of Huron assaulted plaintiff, &c., &c.

The second count stated that defendant was acting as coroner, &c., &c., and, a jury being duly sworn, held an inquisition on the body of one N. F., then lying dead, and setting forth the finding of the jury; and defendant maliciously, and without reasonable cause, &c., issued his warrant for plaintiff's arrest and committal for wilful murder, on which he was arrested, &c.

The inquisition set out that N. F. came to his death from the effects of laudanum administered on the strength of a prescription given by John H. Garner (the plaintiff), through his culpable negligence in not having given his written directions sufficiently explicit.

The defendant pleaded not guilty by Statute (Consol. Stats. U. C. ch. 126, secs. 1 to 20, and ch. 125, secs. 1 to 11.

At the trial, at Goderich, before Richards, C. J., apparently after the opening of plaintiff's counsel, it was objected for defence that defendant, as coroner, was Judge of a Court of Record and not liable for anything done in his judicial capacity, or for erroneous judgment. Plaintiff urged, that defendant having held an inquest, and the jury having made an inquisition, which shewed no crime, defendant issued his warrant under pretence of carrying that out over which he really had no jurisdiction, and proposed to shew that he acted maliciously, that the inquisition must shew that it was taken, the body being present, to inquire into the death and shew the place, and that this inquisition did not shew that on its face which gave jurisdiction; but plaintiff did not deny that the inquiry was made within the jurisdiction of the coroner, or that the body was present.

On these facts the learned Chief Justice nonsuited the plaintiff, with leave to set it aside.

In Easter Term last a rule was obtained to set aside the nonsuit, on the ground that plaintiff was wrongfully prevented from giving evidence to support his case.

A. Richards, Q. C., now shewed cause, citing *Thomas Churton*, 2 B. & S. 475; *Garnett v. Farrand*, 6 B. & C. 610; *Hammond v. Howell*, 2 Mod. 218; *Fray v. Blackburn*, 3 B. & S. 576; *Agnew v. Stewart*, 21 U. C. 396; *Groenvelt v. Burwell*, 1 Ld. R. 454; *Yates v. Lansing*, 5 Johnson, 282, S. C. 9 Johnson 395; *Dicas v. Lord Brougham*, 6 C. & P. 249; *In re W. Miller*, 15 U. C. 244; *Jarvis on Coroners*, 249; *Taaffe v. Downes*, Note A. 3 Moo. P. C. 36; *Calder v. Hallkett*, Ib. 76.

J. B. Read, contra, cited *Regina v. Farley*, 24 U. C. 384; *Floyd v. Barker*, 12 Co. p. 223; *Regina v. G. W. R. Co.* 3 Q. B. 333.

HAGARTY, C. J., delivered the judgment of the Court.

I am of opinion that the defendant is not liable in trespass on the first count. It was conceded that he was acting as coroner, holding an inquest *super visum corporis*, within his jurisdiction, and that he issued his warrant on the finding of the jury. The inquisition is no doubt open to most serious objections, and discloses nothing involving a charge of wilful murder, and probably not of such criminal negligence as would amount to manslaughter.

Numerous cases establish that a coroner is a Judge of a Court of Record. As said by Sir John Robinson, in *Agnew v. Farrell* (15 U. C. 402), "The coroner, as a Judge in a Court of Record, is not liable to a civil action for any thing done by him in his judicial capacity, in whatever other manner his conduct may be called in question, if he has acted indiscreetly or erroneously;" and in *Garnett v. Ferrand* (6 B. & Cr. 625), "The Court of the coroner is a Court of Record, of which the coroner is the Judge, and it is a general rule of very great antiquity, that no action will lie against a Judge of Record for any matter done by him in the exercise of his judicial functions."

The inquisition of the jury pointed at the plaintiff as a person implicated in, or as it were moving to, the death of the subject of the inquiry, and the defendant, as it seems clearly to me, on that exercised his functions as the Judge of that Court, and issued his warrant, although under a most mistaken view of the case.

I think he was acting judicially in so doing, and is as much protected as the Chairman of the Quarter Sessions would be in directing the issue of a bench warrant, on a presentment against a person brought in by the Grand Jury, although very defective in point of legal exactness, and not rightly charging any indictable offence, though intending so to do.

The cases on the subject are very numerous, from *Floyd v. Barker* (12 Co.) downwards. There is a good summary of them in the judgment of Sir W. Erle, C. J., in *Kemp v. Neville* (10 C. B. N. S. 545), where the principle is fully

stated and recognized, and several cases are cited and commented on where the Judge was protected, although he really had not jurisdiction; such as *Gwynne v. Poole* (2 Lutw. 935, 1560). There the defendant was held not liable in trespass, although, as Judge of an Inferior Court, he had caused the plaintiff to be arrested in an action where the cause of action arose out of his jurisdiction: although the *capias* was issued without previous summons and was not made returnable at a certain time, yet he was justified, because he acted as Judge in a matter *over which he had reason to believe* that he had jurisdiction. He also cites *Calder v. Halkett*, (3 Moore P. C. 28), where the magistrate, having jurisdiction over Asiatics in Bengal, but not over Europeans, was held not liable in trespass for apprehending plaintiff under a warrant issued by him, he not knowing the plaintiff to be a European. The Privy Council say that trespass will not lie for a judicial act without jurisdiction, unless the Judge had the means of knowing the defect of jurisdiction, and it lies on the plaintiff in every case to prove that fact.

I therefore think the count in trespass fails.

It was strongly urged, however, that the plaintiff should have been allowed to offer evidence of malice on the second count, and that the protection awarded to defendant, as acting judicially, will fail, if he be shewn to have acted *mala fide*, maliciously, and without reasonable or probable cause.

Generally, where there is reasonable and probable cause for the act complained of, it is of no moment whether there was malice or not. In the present case, if the jury found a verdict of wilful murder against plaintiff, and thereupon the coroner had regularly issued his warrant for plaintiff's committal, I think it would be wholly unimportant whether defendant was actuated by malice or not: the verdict would be his full justification, whatever his motives.

In *Fray v. Blackburn* (3 B. & S. 576), which was an action against a Judge of the Queen's Bench, Crompton, J., says, "It is a principle of our law that no action will lie against a Judge of one of the Superior Courts for a judicial

act, though it be alleged to have been done maliciously and corruptly."

Thomas v. Churton (2 B. & S. 475) was an action against a Coroner for slanderous words, in addressing the jury on an inquest, charging it to have been done falsely and maliciously. It was held the action did not lie. Blackburn, J., says, "In *Miller v. Hope* (2 Shaw's Ap. Cases 195) it was held that an injurious censure cast by a Judge on a counsel practising before him, even though done injuriously and from private malice, is not actionable." Cockburn, C. J., says, "I am reluctant to decide and will not do so, till the question comes before me, that if a Judge abuses his judicial office, by using slanderous words maliciously, and without reasonable and probable cause, he is not liable to an action."

Scott v. Stansfield (L. R. 3 Ex. 320) was an action for slander. Plea, that defendant, a County Court Judge, spoke the words while presiding in his Court trying a cause in which plaintiff was a party. Replication, that the words were spoken falsely, maliciously, and without reasonable or probable cause, without foundation, and not *bona fide* in discharge of his duty as Judge, but immaterially irrelevant and impertinent, &c., in respect of the matters before him, of all which defendant had notice. Demurrer and joinder. Kelly, C. B. : "A series of decisions, extending from the time of Lord Coke to the present time, establish the general proposition, that no action will lie against a Judge for any acts done or words spoken in his judicial capacity in a Court of Justice. This doctrine has been applied not only to the Superior Courts, but to the Court of a Coroner, and to a Court Martial, which is not a Court of Record. * * * If a question arose as to the *bona fides* of a Judge, it would have to be submitted to a jury * * * We should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, &c., &c." Martin, B. : "No Judge would be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely

and maliciously, and not *bona fide* in the discharge of his duty, &c., a jury would have to determine the question, whether what he said in the course of a case, which he had jurisdiction to try, was or was not said under the circumstances so alleged." It was held the action would not lie. Hawkins, Pl. C. 446, sec. 6: "And as the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal causes, it has also freed the Judges of all Courts of Record from all prosecutions whatever, except in the Parliament, for anything done by them openly in such Courts as Judges."

The judgment of Kent, C. J., *Yates v. Lansing* (5 Johnst. 284), in 1810, is a good summary of the law to that period, and its statement of the principle as to judicial liability is highly commended by the Court in *Scott v. Stansfield*, cited above. It is not easy to reconcile all the cases. *Booth v. Clive* (10 C. B. 827) is an action against a County Judge for maliciously issuing an order for plaintiff's arrest for non-payment of certain instalments of a debt and costs recovered, after serving on him a writ of prohibition. Plaintiff obtained a verdict, and the only question raised at trial, or in an elaborate argument in term, was as to whether he was entitled to notice of action or not. Nothing whatever is reported as to his exemption from judicial liability.

In *Houlden v. Smith* (14 Q. B. 841) defendant was a County Court Judge in Lincoln. Plaintiff resided in Cambridgeshire, and was summoned there to defendant's Court and judgment recovered against him. Afterwards he was summoned to appear and be examined, and he did not appear, and was afterwards arrested on defendant's warrant and committed. The Statute provided that this summons to examine could only issue from the Court within whose limits the debtor resided; so it and the warrant were clearly without jurisdiction. The Court held defendant liable in trespass; that defendant ordered it under a mistake of the law and not of the facts; that from the previous proceedings he must have known that the debtor lived in

Cambridgeshire, and "his mistaking the law, as applied to these facts, cannot give him even a *prima facie* jurisdiction, or semblance of any. * * * The question of jurisdiction or not must depend on the state of facts as they appeared to the Magistrate or Judge assuming to have jurisdiction."

Sir Wm. Erle, in noticing this case in *Kemp v. Neville* says, "The Judge of the County Court was there held liable in trespass, because he had the means of knowing that he had no jurisdiction."

In the present case the second count sets out that defendant was acting as Coroner, and states everything as done regularly before him to the return of the inquisition by the jury, which it sets out. Then it alleges that defendant, well knowing the premises, maliciously and without reasonable and probable cause, issued his warrant, reciting that plaintiff stood charged with the wilful murder of N. F., and maliciously and without reasonable and probable cause directed his arrest and committal to gaol, &c.

Had the Coroner's warrant been issued for manslaughter, there would have been some colour of ground for it in the inquisition, which it might be said inartificially charged a death by plaintiff's criminal negligence. In such a case it would, I think, be difficult to say there was an absence of reasonable and probable cause; and if there were such cause, then the existence of malice is unimportant. If there were reasonable cause for plaintiff's arrest and committal for the homicide of lesser degree, does his stating the crime in his warrant as of a higher character destroy his protection? I feel very great difficulty in saying that it does, and still greater difficulty in holding that the case is not governed by the principles of law laid down in *Thomas v. Churton*, *Fray v. Blackburn*, and *Scott v. Stansfield*. The law laid down as applicable to slanderous words, spoken maliciously and without reasonable cause, ought equally to apply to injurious acts done maliciously and without reasonable or probable cause. As to words, the language of

the Court in the latest case is beyond question conclusive in favour of the defendant's contention. All we know of this case is from the short report of the learned Chief Justice. He states that plaintiff proposed to shew that defendant acted maliciously, not stating how or in what particular. I wish it to be distinctly understood that I act wholly on the learned Chief Justice's report of what was urged to him at the trial. It may be quite possible that other questions might have arisen, had the evidence been fully gone into. I cannot say that I am free from doubt on the whole case; but I am unable to arrive at the conclusion that the nonsuit was certainly wrong,—so wrong that I can feel warranted in setting it aside;—but if the plaintiff desire to present facts to the jury not suggested at the trial, we are willing he should take his case down to trial and set aside the nonsuit on payment of costs.

Rule accordingly.

MCCALLA V. ROBINSON ET AL.

Bills of exchange and promissory notes—Stamps—27 & 28 Vic. ch. 4—29 Vic. ch. 4—Pleading.

Declaration on promissory note, against endorser.

Plea, that at the time plaintiff became a party to said note proper stamps were not affixed, and double stamps not affixed until a long time after.

Replication, that note endorsed in blank to plaintiff, who, while holder and before maturity, affixed double stamps, and thus note became valid in plaintiff's hands:

Held, on demurrer, replication bad, as not averring that as soon as plaintiff became aware that the proper stamps had not been affixed to the note by the proper parties at the proper time, he affixed stamps to double the original duty.

Declaration against the defendant Pawling, as indorser of a promissory note for \$500. The defendant Thomas D. Robinson had let judgment go by default, and a *nolle prosequi* was entered as to the other defendant Robert Robinson.

Pleas, 1. A denial of the indorsing. 2. That at the time plaintiff became a party to the said note proper stamps were not affixed, and double stamps were not affixed until a long time thereafter.

Replication, that plaintiff never was a party to note, but that note was indorsed by Robert Robinson in blank to plaintiff, and that plaintiff, whilst the holder thereof, and before it became due, affixed double stamps, and thus the note became valid in plaintiff's hands.

Demurrer :

1. Replication no answer to defendant's pleas.

2. Replication confessed plea, but did not avoid by sufficient answer in law.

3. Replication admitted note endorsed to plaintiff in blank and at the time of delivery to plaintiff was unstamped, and that he (plaintiff) did not, at the time of receiving same, affix proper stamps; but admitted, as alleged in the plea, that stamps not affixed for a long time after receipt thereof.

4. That at the time of such endorsement and delivery plaintiff became a party within the meaning of the Bill Stamp Act, and ought then to have affixed double stamps to make the note valid and legal, but that not being done it could not be done a long time after.

5. That if plaintiff, on so becoming holder, did not become a party to said note, within the meaning of said Act, then he never became a party to such note, and could not affix thereto various stamps in double value, as required by law, to make note valid, and therefore such note invalid and void.

R. A. Harrison, Q. C., for the demurrer.

J. H. Cameron, contra.

The following authorities were referred to: *Baxter v. Baynes*, 15 C. P. 237; *Stephens v. Berry*, Ib. 548, 553; *Henderson v. Gesner*, 25 U. C. 184, 186; Ch. Bills, 9th ed. 27; 27 & 28 Vic. ch. 4, secs. 1, 2, 8, 9; 29 Vic. ch. 4, secs. 4, 5.

J. WILSON, J., delivered the judgment of the Court.

By the 27 & 28 Vic. ch. 4, the duty of affixing the proper stamps was cast upon the maker or drawer of any promissory note, draft, or bill of exchange, made or drawn within this Province; and in the case of drafts or bills of exchange drawn out of this Province upon the acceptor thereof, or the first endorser thereof in this Province.

If any person within the Province made, drew, accepted, endorsed, signed, became a party to or paid any promissory note, draft or bill of exchange, chargeable with duty, before such duty or double duty had been paid, by affixing thereto the proper stamps, he incurred a penalty of \$100, except that any subsequent party to such instrument, or person paying the same, might, at the time of his so paying or becoming a party thereto, pay such double duty, by affixing to such instrument a stamp or stamps to the amount thereof, or the amount of double the sums by which stamps affixed fell short of the proper duty.

Under this Act it was doubtful whether the holder of any such instrument was authorized to affix stamps to pay the double duty, so as to make it valid in his hands. This Act was amended by the 29 Vic. ch. 4, by providing that no party to or holder of any such instrument should incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time, and by the proper party or parties, and that he paid such duty *as soon as* he acquired such knowledge; and any holder of such instrument may pay the duty thereon and give it validity under the ninth section of the former Act, without becoming a party thereto. Before this Act the holder of any such instrument could not have given it validity by affixing stamps to double the duty, without becoming a party to it: now he may, provided he does it as soon as he acquires such knowledge, that is, the knowledge that the proper stamps had not been

affixed. The plea here is, that, at the time the promissory note was made, it had not the proper stamps affixed to it, nor had it them affixed at the time it was endorsed and delivered to the plaintiff. The plaintiff replies that he never was a party to the note, but Robert Robinson endorsed it to him, and from thence, until and after it became due, he continued the holder thereof, and that while he was such holder, and before it became due, he affixed stamps to double the amount originally required to be affixed thereon. This replication fails to shew that, as soon as he acquired the knowledge that the proper stamps had not been affixed to this promissory note by the proper parties at the proper time, he affixed to it stamps to double the original duty. We therefore think it bad.

See *Ritchie v. Prout* (16 C. P. 426); *Baxter v. Baynes* (15 C. P. 237); *Stephens v. Berry* (15 C. P. 548); *Henderson v. Gesner et al.*, (25 U. C. R. 184).

Judgment for defendant on demurrer.

McCALLUM V. BUFFALO AND LAKE HURON RAILWAY COMPANY.

*Railways and Railway Companies—Amalgamation—Accident—Negligence—
Liability—Plea of not guilty.*

By 29 & 30 Vic. ch. 92 an agreement, dated 7th July, 1864, between the defendant's Company and the Grand Trunk Railway Company of Canada is set out, and by sec. 7 it is enacted that the Act is not to come into force until accepted by the shareholders of the respective Companies, in the manner therein provided. By 31 Vic. ch. 19 sec. 6, this agreement, according to date and conditions of acceptance, is recited, as also the fact of the acceptance of such agreement by the Companies; and it is then enacted that the said Companies may, during the continuance of such agreement, alter and vary the terms thereof, &c., &c. By the Interpretation Act (31 Vic. ch. 1 sec. 6, sub-sec. 38) every Act is to be deemed a public Act, unless expressly declared to be a private Act, and is to be judicially noticed by Judges, &c., without being specially pleaded. The agreement between the two Companies, set out in the above Act, is for the working of defendants' lines by the Grand Trunk Railway Company from 1st July, 1864, for twenty-one years; the net receipts, with certain deductions, to be divided in certain proportions between the two Companies; the control and working of defendants' road from the time of its being handed over to the Grand Trunk Railway Company, to be placed in the hands of the latter under a joint committee selected from the boards of each Company, and the defendants' railway and appurtenances during said term to be kept in good repair, &c.

The plaintiff, in this case, sued the defendants for injury to his land caused by fire emitted from a steam engine, which was being propelled along defendants' line of road, alleging negligence in the management of the said engine, &c., &c. The evidence at the trial clearly shewed that since 1864 the Grand Trunk Railway Company had worked the line, and that defendants, as a Company, had had nothing to do with the working; that all the alleged damage was caused by the Grand Trunk Railway Company's engines and servants, and that defendants beyond their ownership of the road, were unconnected with the injuries complained of:

Held, that defendants were not liable; and that the plea of not guilty simply raised the whole defence which ought to prevail to the action.

Held, also, that ch. 19 sec 6 of 31 Vic. not merely *recited* the fact of the agreement of 1864 being accepted, but that it legislated upon it as accepted and binding, in its enacting part; but, *Seemle*, that even if merely recital, it would be good *prima facie*, though not conclusive, evidence of the fact.

Held, also, that because defendants were to receive a portion of the net profits, they were not, on that account, to be considered partners and liable as such.

The declaration stated that plaintiff owned certain lots, through which the railway, used by defendants for pro-

pulling steam engines along, containing fire, passed, and defendants, by their servants, &c., so negligently managed an engine, &c., that fire and sparks flew out of the engine and settled on the grass, &c., of plaintiff's lands, whereby damage was done, &c.

The second count alleged that defendants possessed a strip of land separating their track from plaintiff's land, on which they negligently allowed dry wood, leaves, &c., to accumulate, on which hot ashes, &c., fell from said engine by their negligence, while propelled along the railway, &c., and the grass, &c., on the strip took fire by defendants' negligence, &c., and extended to plaintiff's lands, &c.

The defendants pleaded not guilty by Statute (14 & 15 Vic. ch. 51 sec. 20, 19 Vic. ch. 71, the whole Act, ch. 66 Consol. Stats. Canada, the whole Act).

The case was tried at Cayuga, before Morrison, J.

The fire occurred in August, 1867, just after the express train passed.

It was proved that in 1864 some amalgamation arrangement was made between defendants and the Grand Trunk Railway Company, and since that time defendants had had nothing to do with the working of the railway, but it had been conducted and managed for the Grand Trunk Railway Company, there being some arrangement about division of profits.

The engine alleged to have caused the mischief and the train belonged to the Grand Trunk, which employed the officers and servants. Defendants had no organization (it was sworn) in the County of Haldimand: everything was transferred to the Grand Trunk, whose servants managed the railway. The engine driver on the day of the fire was a servant of the Grand Trunk.

It was objected for defendants that they were not liable, but that the action should have been against the Grand Trunk Company; and further, that the action was too late, as six months had elapsed since the injury.

Leave to move to enter a nonsuit was reserved, and plaintiff had a verdict on the merits.

E. B. Wood obtained a rule on the leave reserved.

Harrison, Q. C., shewed cause. He cited *Vanomenon v. Dowick*, R. 2 Camp. 45; *Rex v. Forsyth*, R. & R. 274; *Rear v. Holt*, 5 T. R. 436; *Atty. Genl. v. Theakstone*, 8 Pr. 89; *Edwards v. Sherren*, 11 M. & W. 595; *Rex v. Wallace*, 14 W. R. 462; *Rex v. Sutton*, 4 M. & S. 532; *Ros. Ev.* 11 ed. 54; *Rex v. Dr. Berenger*, 3 M. & S. 67; *Rex v. Greene*, 6 A. & E. 548; *Rex v. Haughton*, 1 E. & B. 501; *Taylor v. Parry*, 1 M. & G. 604; *Bennett v. Covert*, 24 U. C. 38; *Duke of Beaufort v. Smith*, 4 Ex. 450; *Hamilton v. Covert*, 16 C. P. 205; *Cayley v. Cobourg & Peterboro R. Co.*, 14 Gr. 571; *Ballard v. Way*, 1 M. & W. 520; *Earl of Carnarvon v. Villebois*, 13 M. & W. 313; *Green v. Beesley*, 2 B. N. C. 108; *Brett v. Beckwith*, 3 Jur. N. S. 31; *Greenham v. Gray*, 4 Ir. C. L. Rs. 501; *Lindley*, Part 2 Ed. p. 8; *Ex. p. Langdale*, 18 Ves. 300; *Edwards v. Hodges*, 15 C. B. 477.

McMichael, contra, cited *Mitchell v. Craswell*, 13 C. B. 237; *Dean v. McArthy*, 2 U. C. 448; *Auger v. S. & H. R. Co.*, 9 C. P. 164; *Reg. v. Greene*, 6 A. & E. 548; *Wharton Peerage*, 12 Cl. & F. 300.

HAGARTY, C. J., delivered the judgment of the Court.

Apart from any question of Parliamentary sanction to the alleged arrangement between defendant and the Grand Trunk Company, it is objected that, if the engine and train that caused the damage to plaintiff were the property of the Grand Trunk, driven and managed by their servants, and that the latter solely used and worked the road, the plaintiff has not been damnified by the neglect or default of these defendants. With or without Parliamentary sanction, the evidence shews that the trains on the road are wholly in the hands of the Grand Trunk Company, with the assent of defendants, and since 1864 defendants have had nothing to do with the working of the line. If we accede to plaintiff's view, we must hold that the Grand Trunk servants are the servants of the defendants, who are to be held liable for their acts of carelessness.

The damage here is not from the construction of the railway, or from any liability arising from the omission to perform some duty specially imposed by law on defendants, as a corporate body: it arises solely from alleged carelessness in permitting the escape of fire from a passing engine.

This must arise from the neglect of an agent or servant, and to make the defendants, the mere road-owners, responsible for his act, the relation of principal and agent or master and servant ought to exist.

If defendants' road had been illegally and against their will, or by high-handed violence, taken out of their hands for a day, and the trespassers either put on an engine of their own, or seized and ran an engine of defendants, and by careless management did this damage, I do not see how this action would lie against defendants. They could not be liable for the carelessness of persons for whom they were in no way responsible. But it is not necessary to consider the case in these aspects.

By Stat. 29, 30 Vic. ch. 92, an agreement, dated 7th July, 1864, between the two Companies, is set out in a schedule and is legalized under conditions; and sec. 7 declares that the Act shall not come into force until accepted by two-thirds in value of stockholders, &c.

No evidence was offered of such ratification; but Stat. 31, Vic. ch. 19, sec. 6, after reciting that this agreement, giving its date and the conditions as to its acceptance by the shareholders, and that the meetings of the Companies had been held, and that they had duly accepted the agreement, then proceeded to enact that it should be lawful for the Companies from time to time, during continuance of the agreement now subsisting between them, dated 7th July, 1864, under their respective common seals, to alter and vary the terms and conditions of such agreement, "on certain conditions as to any new agreement being confirmed," &c., &c., &c.

By the Interpretation Act, passed the same Session and assented to same day, (31 Vic. ch. 1, sec. 6, sub. 38), every

Act is to be deemed a public Act, unless expressly declared to be a private Act, and shall be judicially noticed by Judges, &c., without being specially pleaded.

I am of opinion that this chapter 19, section 6, not merely *recites* the fact of the agreement of 1864 being accepted, but legislates expressly upon it as accepted and binding in its enacting part, and that it is unnecessary to consider the cases cited as to the effect of mere matters of recital. Even if merely recital, it might perhaps be good *prima facie*, though not conclusive evidence, of this fact. (See *Rex v. Greene*, 6 A. & E. 548; *Rex v. Haughton*, 1 E. & B. 501); but it is unnecessary to decide that point in the face of this 6th section.

Then we turn to the Act of 1866 (chap. 92). The agreement set out is for a working of the defendants' line by the Grand Trunk Company, from the 1st July, 1864, for twenty-one years, the net receipts, deducting renewals of rails, to be divided in certain proportions, ranging as the year advances; as, say in 1868, 84½ to Grand Trunk, 15½ to defendants. By sec. 6 the control and working of defendants' road, from the time of its being handed over to the Grand Trunk, shall be placed in the hands of the Grand Trunk Company under a joint committee, consisting of two nominees from the Board of each Company: Sec. 8; and defendants' railway and appurtenances be maintained and kept in good repair, &c. Sec. 3 of the Statute declares that the Grand Trunk Railway Company in working defendants' line, shall have the right to use, exercise and enjoy all the rights, powers, &c., conferred on the B. & L. H. Company.

The evidence at the trial very clearly shewed that since 1864 the Grand Trunk Company had worked the line, and that defendants, as a Company, had nothing to do with this working. All the alleged damage was caused by the Grand Trunk engine and servants, and defendants, beyond this ownership of the line, are unconnected with the injuries.

I cannot accede to the argument that, because the defendants receive a portion of the net receipts, they are to be

considered partners, and liable as such. I look upon defendants' position as that of a Company paid for the use of their line an annual sum, bearing a certain proportion to the net earnings. If the argument be sound as to partnership, it would make them liable for the payment of wages to servants, firewood, and supplies; to say nothing of damages for the death or injury of passengers.

We have looked at the cases of *Bennett v. Covert* (24 U. C. 38), *Hamilton v. Covert* (16 C. P. 205) and *Cayley v. Cobourg Railway Company* (14 Grant, 571). They are all, we think, distinguishable. *Taylor v. Great Northern Railway* (L. R. 1 C. P. 385) bears on this case. Defendants were sued for delay in delivering goods on their line. It appeared their train was delayed by an accident to a train of the Midland Railway Company, who had running powers on a portion of defendants' line. It was held, in the County Court, that, as the Midland Company used defendants' line by their permission, the latter were liable for delay caused by neglect of the servants of the former.

The Court held otherwise on appeal.

Sir Wm. Erle says: "The County Judge took an erroneous view of the relations between the two Companies. The Legislature has declared by many Acts that it is for the public good that Railway Companies should have running powers over each other's lines, and it has specially declared it to be so in the case of the present agreement, confirmed by 23 Vic. ch. 67. The Midland Railway Company, therefore, were not merely using the line by the defendants' permission, but were exercising a Statutory right, and the defendants were not responsible."

In the view I take it is unnecessary to consider the point as to the six month's notice. As to the pleadings, I think *not guilty* simply raises the whole defence which we think ought to prevail.

Since writing the above we have seen the judgment delivered this term in *Vannater v. these defendants*, and find the Court of Queen's Bench take the same view as to the defendant's liability for not fencing; and certainly, if

not liable for defect of fences, *a fortiori* they ought not to be so for injuries done by the Grand Trunk engines and servants.

Rule absolute for nonsuit.

LOWE V. MORICE.

Action on bond—8 & 9 Wm. 3 ch. 11—Plea of payment into Court—Receipt—Construction—Evidence.

Debt on bond with conditions, one of which being that defendant should deliver to plaintiff in F., at the current price during delivery, twelve cords of wood during the next winter after date of bond, and each following winter, until, &c.: *Breach*, the non-delivery of the wood in the winter next following date of bond, and in the two succeeding winters.

Defendant pleaded, as to part of the breach assigned, payment of \$25 into Court, which was sufficient, &c., and as to the remainder of the breach, performance :

Held, on demurrer, a bad plea.

Held, also, that plaintiff was entitled to demur to the plea, and was not obliged to apply to strike it out.

A receipt produced at the trial, as evidence of payment of a couple of sums payable 1st November, 1867, was in these words :

“\$35.

FERGUS, 9th Nov., 1867.

Received from Mr. Robert Morice the sum of thirty-five dollars, being the amount due of him for the instalment ending 1st November, 1867, of a bond.

ROBERT LOWE.”

Held, no evidence of payment on 1st November, for that the construction of the receipt (and the question was one of construction, and not of presumption) was an acknowledgment of payment, made on the day it bore date, of a sum of money due on 1st November.

This was an action of debt on bond with conditions, one of the conditions being that the defendant should deliver to the plaintiff in Fergus, at the current price during such delivery, twelve cords of good hardwood fire wood during the next winter after the date of the bond and each following winter, until the value of one hundred dollars should have been completed. The bond was dated 15th August, 1865. The plaintiff, in his declaration, under the provisions of 8 & 9 Wm. III., c. 11, assigned, as a breach of the above condition, the non-delivery of the cordwood in the winter next following the date of the bond and in the two

succeeding winters, that is, in the winters of 1865, 1866 and 1867, stating the current value of cordwood to have been, in 1865 \$1.25, in 1866 \$1.50, and in 1867 \$2.00 per cord.

To this breach the defendant pleaded, as to part, namely, the alleged non-delivery in the winter of 1867, payment of \$25 into Court, which he alleged to be sufficient to satisfy the claim of the plaintiff as to the part of that breach pleaded to, and as to the residue of the breach, performance.

To this plea the plaintiff demurred.

Harrison, Q. C., contended that the plea was good on demurrer, upon the authority of *Thompson v. Kaye et al.* (13 C. P. 251), and that plaintiff's only remedy, if any, was to move to strike it out under the 119 sec. of the C. L. P. Act.

Anderson and *Palmer*, on the contrary, contended that the plea was bad on demurrer, upon the express authority of *England v. Watson* (9 M. & W. 333), which was not cited in *Thompson v. Kaye*. Moreover, they contended that the latter case was not applicable to an action on a bond such as this, in which, on the bond being forfeited, plaintiff was entitled to judgment as a security for future breaches.

GWYNNE, J.—In the case of a bond with conditions within the Statute 8 & 9 Wm. III., upon any default in performance of any of the conditions, the bond became forfeited, and the obligee became entitled to bring his action and prosecute it to judgment, and the Court had no power to stay the action, even though the obligor should pay all sums accrued in respect of past breaches interest and costs: *Masfen v. Touchet* (2 Wm. Black. 706); *Tighe v. Crafter* (2 Taunt. 387); *Vansandan v. Burt*, one, &c. (5 B. & Al. 42). The Statute (sec. 8) expressly provides, "that, upon paying into Court the amount of the damages, the execution may be stayed, but the judgment is to stand as a security." Prior to the Imperial Statute 3 & 4 Wm. IV. ch. 42,

sec. 21, of which our Provincial Stat. 7 Wm. IV. ch. 3 sec. 13, is a transcript, it was not competent for a defendant to pay money into Court in an action upon such a bond. 7 Wm. IV. ch. 3 sec. 13 enacted, "That it shall be lawful for the defendant in all personal actions, except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching the plaintiff's daughter or servant, by leave of any Court of Record, where such action is pending, or of a Judge thereof, to pay into Court a sum of money, by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and the form of pleading, as the said Judges of His Majesty's Court of King's Bench, or a majority of them as aforesaid, by any rules or orders by them to be from time to time made, shall order and direct."

Under this clause of the Statute the Judges, in Easter Term, 5th Vic., adopted the following rule: "When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis*," (giving a form of plea).

This Statute and rule did [not authorize the payment of money into Court in any case in which it was not authorized before the Act: the only object and effect was to substitute a plea for the old order, and to obviate the necessity of proving it: *Aston v. Parkes* (15 M. & W. 388 & 390). In that case, which was an action for assault and battery, one of the actions excepted in the Statute, the defendant pleaded payment of money into Court, to which the plaintiff replied damages ultra, on which issue was joined and a verdict rendered for the defendants. The plaintiff moved for *judgment non obstante veredicto*, or for a repleader, upon the ground that payment into Court was not pleadable in such action; but the Court discharged the rule, saying "because for anything that appears on the record, according to which alone we are to give judgment, it may have been pleaded by a Justice or officer entitled by Statute and the new rules together to such a plea."

These observations would not, it is clear, apply to a case within the Statute of Wm. III., where inapplicability of such a plea would appear upon the Record.

That such a plea can not be pleaded in such an action was expressly decided, upon general demurrer, in *England v. Watson* (9 M. & W. 333), and this is still laid down to be the law in 2 Lush's Practice, 3rd edition, 823. Even to a common money bond within the Statute of Anne it can in England now be pleaded only in virtue of the C. L. P. Act of 1860, 23 & 24 Victoria, c. 126, sec. 25; but this Act does not authorize it in cases within the Statute of Wm., for the plea is inconsistent with the right of the plaintiff in such cases to retain his judgment as a security for further breaches.

Neither the Common Law Procedure Act of 1852, in England, nor our Statute, 22nd Vic. ch. 22, authorizes the payment of money into Court in any action where it was not pleadable before the Act, except in cases of slander coming within the fifth section of the Act to amend the law relating to libel and slander. With this exception, and that in the case of a sole defendant, no leave of the Court or a Judge is necessary, the language of the Common Law Procedure Act is identical with the Act of 7th Wm. IV., upon which the new rules were framed.—See sec. 99. That the Common Law Procedure Act had no more extensive operation in this respect than the new rules in connection with the Act upon which they were framed had before is conceded in argument and admitted by the Court in *Thompson v. Sheppard* (4 El. & Bl. 57).

That was an action for assault and battery, to which the defendant pleaded payment of 40s. into Court, to which the plaintiff demurred, and also replied "that the defendant did what is complained of under circumstances which did not authorize the defendant to pay money into Court, and that there was not any Statute under or by virtue of which the defendant was authorized or empowered or entitled so to do."

This replication was filed plainly for the purpose of en-

deavouring to meet the decision in *Aston v. Perkes*, by placing upon the record matter whereby it would appear that the plea was inapplicable to the action. The Court overruled the demurrer to the plea and held that the replication was bad, upon the authority of *Key v. Thimbleby* (6 Ex. 692) and *Aston v. Perkes*. Coleridge, J., giving judgment, says: "The action not being one in which money could be paid into Court, according to the general law, the defendant could only have a right to pay it in if he had been acting in some character, or under some special circumstances which entitled him under the provisions of some Statute to pay money into Court, and the question raised was, whether in such case, that is, a case where by the general law the defendant could not, but by some special Statute he could, pay money into Court, the one party is to state and the other party deny, if he choose, the special character or circumstances which give the right to pay money into Court, contrary to the rule of law in such action, or whether the plea is to be in the form given by the Common Law Procedure Act 1852, which merely states the payment into Court, and the sufficiency of the sum paid in, leaving the plaintiff to apply to a Judge or the Court if the money is paid in, under circumstances not bringing the case within the special provisions of any Statute."

These remarks apply to a case where, although the action is one of those coming within the exceptions stated in sec. 99 of our Statute 22 Vic. ch. 22, it may nevertheless be an action to which, by virtue of some other Statute, payment of money into Court may be pleaded. If the character, in virtue of which a defendant should claim the right to pay money into Court contrary to the general law, should be permitted to be stated in the plea, or denied in the replication, the pleadings would be open to the exception taken by Baron Parke in *Aston v. Perkes*, at p. 388 of 15 M. & W.; namely, that the statement (or denial) of the defendant's character on the record, so as to sustain or dispute his right to pay the money into Court, would have the

effect of submitting to a jury to decide, as a matter of fact, what the Legislature says shall be decided by a Judge as a matter of law, and to the exception pointed out in *Key v. Thimbleby*, that such a mode of pleading in a plea would narrow the plaintiff's right of new assigning.

These remarks are inapplicable to a case of an action upon a bond within the Statute of Wm., which is not one of the cases within the 99th section of our Common Law Procedure Act at all; for, as it were to remove all doubt, the 148th section provides that, "notwithstanding *anything* in this Act contained, the provisions of the Act of the Parliament of Great Britain, passed in the session held in 8th & 9th years of the reign of King William III., entitled, &c., as to the assignment of breaches or as to judgment shall continue in force in Upper Canada." This language seems very clearly to convey that actions upon bonds within the Statute of Wm. III. remain upon the same footing as they did before, wholly unaffected by the Common Law Procedure Act; and there is nothing in *Aston v. Perkes*, or *Key v. Thimbleby*, or *Thomson v. Sheppard*, tending to throw any doubt upon the correctness of the judgment in *England v. Watson*.

In *The Bishop of London v. McNeil* (9 Ex. 490) the plaintiff declared upon a bond, setting out the condition of the bond and alleging several breaches in the declaration under the Statute of Wm. The defendant pleaded, as to two of the breaches, payment of money into Court. The plaintiff moved under the 52nd section of Common Law Procedure Act of 1852, corresponding with the 119th section of our Act, to strike out the plea, as embarrassing, and it was struck out; but upon the ground, as I read the judgment, that the plea was clearly bad upon general demurrer. In that case the defendant's counsel urged that the proper mode of objecting to the plea was by demurrer. Parke B., during the argument says, "A defendant is clearly not entitled to pay money into Court in a case where the plaintiff has assigned several breaches in his declaration under the Statute 8 & 9 Wm. III. c. 11, by which, the judgment

obtained by the plaintiff is to stand as a security for any further breaches. *If the jury were to find that the sum here paid into Court is sufficient for past breaches, how could the judgment stand as security?*" Alderson B., says, "The Statute 8 & 9 Wm. III. c. 11 is expressly excepted out of the operation of the Common Law Procedure Act by the 96th section, from which our 148th section is taken. Pollock, C.B. says, "If there be any serious question as to the validity of the plea, I doubt whether we ought to interfere upon motion," that is, whether the defendant should not be left to his demurrer; but, because he had no doubt it was a bad plea, open to demurrer, the rule to strike it out was made absolute. In giving judgment the Chief Baron says, "I think it is quite clear the plea is bad." Parke, B., says, "I think, also, that the plea is no answer to the action: payment into Court cannot be pleaded unless the plea answers the cause of action, which this plea does not." Now, a plea which offers no answer at all to the cause of action, must be bad upon general demurrer, and it was because it was so clearly bad as to be open to general demurrer that this plea was struck out, although the defendant's counsel contended that its validity should be tested only by demurrer.

I have gone thus at large into this case, because it was contended in argument that the case of *Thompson v. Kaye et al.* (13 C. P. 251), in which *England v. Watson* was not cited, is an authority to the contrary and sustains the validity of the plea in this action.

I have carefully perused that case and I have come to the conclusion that the learned Chief Justice, who delivered the judgment of the Court in that case, never contemplated deciding at variance with *England v. Watson*, and that his judgment is not open to the construction that, in his opinion, a plea of payment of money into Court, to an action on a bond, where several breaches are assigned under the Statute of Wm., as is here the case, is not open to a demurrer.

That was an action upon a replevin bond, on which the only breaches stated were—1st, non-payment of the costs of

the replevin suit, or of the writ for the return of the goods, or the Sheriff's fees. 2nd. That the plaintiff sustained damage in this, that the goods replevied were depreciated in value before the return thereof, and though appraised at a larger sum than the rent distrained for, produced much less, and that the plaintiff expended £14 13s. 2d. in defending the action of replevin.

True it is that the plaintiff assigned, as cause of demurrer, that a replevin bond with such a condition comes within the Statute of William, and the Chief Justice in his judgment recites that the plaintiff had raised this objection; but, in giving his judgment, he brings the case within the 99th section of our Common Law Procedure Act, and having done so he rests his decision upon *Thompson v. Sheppard*, which, as I have stated, proceeded upon *Aston v. Perkes* and *Key v. Thimbleby*. Now, I do not think we are warranted in holding that the learned Chief Justice, by deciding that an action on a replevin bond was an action within the 99th section of our Common Law Procedure Act, intended also to decide that an action upon a bond, such as the one in this case appears to be, a bond within the Statute of Wm. III., is also within the same section. Such a construction would ignore the 148th section altogether. If, then, this case be not within the 99th section, the *ratio decidendi* in *Thompson v. Kaye* is inapplicable. In *Bletcher v. Burn* (24 U. C. 265) the same learned Judge decides, with *Thompson v. Kaye et al.* before him, that notwithstanding the Act 23rd Vic. ch. 45, a replevin bond is not within the Statute of Wm. III. In such an action, as the learned Chief Justice suggests in *Thompson v. Kaye*, payment of all that is sufficient to satisfy the breaches assigned is a satisfaction of the action. There is no judgment in such a case as a security for future breaches. When we consider, therefore, that to allow this plea would have the effect of depriving the plaintiff of the benefit of having his judgment to stand as a security for future breaches, which is expressly given by Statute, the bond being forfeited as the plea admits, I come to the conclusion that the

learned Chief Justice did not by his decision in *Thompson v. Kaye* intend to overrule that in *England v. Watson*, and that we are not justified in extending its application by giving it that construction. By doing so I have no doubt that we should be giving it an effect not intended by the learned Chief Justice, whose observations are to be construed as applicable only to the case of a replevin bond, which was the nature of the bond then before him. The bond then being forfeited, the plaintiff is entitled to his judgment in this action. That judgment can only be recovered once, and if it can not be entered in this action, the action must still remain pending; for a judgment for the defendant upon this demurrer, in favor of a plea which is not a plea to the action, can scarcely be held to be, I think, a judgment in bar of the action; and if not, the pendency of the present action might still be pleaded in abatement to an action hereafter brought upon the same bond for a future breach, as was done in *Randall v. Burton* (23 U. C. 268); and if a judgment in bar of the action could be entered for defendant on this plea, then judgment would be entered for defendant upon a record shewing the plaintiff to be entitled to judgment. The plea, then, admitting the bond to have been forfeited, the plaintiff is entitled to his judgment, which he can only effectually have by our giving him judgment on this demurrer.

HAGARTY, C. J.—I agree with the result arrived at by my brother Gwynne, and I do not consider we are deciding against any judgment of our Courts bearing expressly on this point.

Sec. 148 provides that the Statute 8 & 9 Wm. III. as to bonds is to remain in force. It seems to me, therefore, that the law, as to offering such a plea to a bond coming under this Statute, remains governed by the practice as it stood prior to the Common Law Procedure Act, subject to the general provisions as to dealing with embarrassing pleas. If so, the case seems governed by the law as laid down in *England v. Watson* (9 M. & W.).

I think my learned brother has taken the right view of *Bishop of London v. McNeil*. I cannot see that because the Court there struck out on motion a decidedly bad plea, that a demurrer may not be properly offered to it.

J. WILSON, J., concurred.

Judgment for plaintiff on demurrer.

The case also went down to trial before Morrison, J., upon a plea of payment, according to the condition of the bond, to a breach assigned of non-payment of two several sums of \$35, payable the 1st of November, 1866 and 1867, upon which issue was joined and a verdict rendered for the defendant.

The receipt produced at the trial was as follows :

\$35.00

“FERGUS, Dec. 9th, 1867.

Received from Mr. Robert Morice the sum of thirty-five dollars, being the amount due of him for the instalment ending 1st November, 1867, of a bond.

ROBERT LOWE.”

This was the only evidence offered of the payment pleaded.

The learned Judge told the jury that the receipt was so worded that, although bearing date a subsequent day, he left it to them to find whether it was paid the 1st of November or a subsequent day, directing them, if paid on the day, to find for the defendant, but if on a subsequent day, for the plaintiff.

Anderson obtained a rule to shew cause why this verdict should not be set aside and a new trial had, on the ground of misdirection of the learned Judge, who tried the case, in telling the jury that a receipt produced in the case, though no evidence to contradict the date was given by the defendant, did not raise a presumption that the money mentioned in the receipt was paid on the day mentioned in the receipt; and on the ground that the verdict was

against evidence in this, that the plea alleged payment, according to the condition of the bond, and the evidence disclosed a payment after the day in the condition mentioned.

Harrison, Q. C., shewed cause, citing *Anderson v. Weston*, 6 B. N. C. 296; *Laws v. Rand*, 3 C. B. N. S. 442; *Hunt v. Massey*, 5 B. & Ad. 902; *Goodtitle d. Baker v. Milburn*, 2 M. & W. 853; *Potez v. Glossopp*, 2 Ex. 191; *Butter v. Mount Garrett*, 7 H. L. Ca. 646, 7; Best Ev. 4 ed. 434, 439; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Rex v. Joliffe*, 2 B. & C. 54; *Tindall v. Brown*, 1 T. R. 167; *Haire v. Wilson*, 9 B. & C. 643.

Anderson, contra.

GWYNNE, J., delivered the judgment of the Court,

Reading the receipt I should certainly say that it is an acknowledgment of a payment then made of a sum of money antecedently due, stating the day on which *it had become due* to have been the 1st November, 1867, and I think the learned Judge should have so told the jury.

Mr. Harrison contends that it affords no presumption that the payment was made on the day it bears date any more than it does of payment having been made the day before, or any other prior day; and with his usual industry he has cited several cases, all of which I have looked at. Many of these have no bearing at all, and, in the view which I take, none of them any material bearing upon the point in issue; for, conceding Mr. Harrison's argument, the receipt clearly does not afford evidence upon its face that the payment was made on the 1st November, 1867, as pleaded, and not upon any subsequent day, and the *onus probandi* being on the defendant, he gains nothing towards maintaining his position, unless he establishes that it does affirmatively shew *primâ facie* evidence of payment on that very day and on no other. None of the cases cited sustain this position, and if any could be found I have no doubt Mr. Harrison's industry would have discovered it. If, then, the receipt does not on its face import evidence of payment having been made *on* the 1st November, 1867,

there was nothing to leave to the jury. The question appears to me to have been one of construction and not of presumption. The question is one of presumption when the dispute is whether or not the instrument was written or signed upon the day it bears date; but here the question is of construction; namely, whether, admitting the receipt to have been signed and given on the day it bears date, as to which there was no dispute, it affords evidence on its face, by reason of the language used, that the payment therein mentioned was made on the 1st of November, 1867, and I do not think it does. Taking the receipt, however, as evidence of payment after that day, the plaintiff would have been entitled only to nominal damages; but the bond being forfeited, he is of right entitled to judgment; so that the point is not merely technical. Unless, therefore, the defendant submits to a judgment with nominal damages on this issue, or unless the plaintiff is content with the judgment in his favor upon the demurrer, which would give him the benefit of his judgment as a security, there should be a new trial without costs.

Rule absolute to enter verdict for plaintiff for 1s. damages.

KING V. THE PRINCE EDWARD COUNTY MUTUAL INSURANCE COMPANY.

Insurance—Different subjects of insurance at separate amounts—Construction of policy—Liability of insurers.

A policy insuring several different subjects of insurance at separate amounts, and containing a provision that "the Company shall be liable to pay to the insured two-thirds of all such loss or damage by fire as shall happen to the property, amounting to no more in the whole than the aggregate of the amounts insured, and to no more on any of the different properties than two-thirds of the actual cash value of each at the time of the loss, and not exceeding on each the sum it is insured for," is to be treated as a separate insurance upon each subject of insurance, and therefore the Company is liable only for two-thirds of the loss on each subject, notwithstanding that on some of the subjects the loss is less than the amount for which those subjects are insured, and notwithstanding that the whole loss is less than the aggregate amount insured.

This was an action on a policy of insurance against

fire, tried at the last Fall Assizes at Cobourg, before Hagarty, C. J.

The policy stated that assurance was made against loss or damage by fire on the following property:

On dwelling-house, &c.....	\$600
On household furniture therein.....	150
On wearing apparel therein.....	40
On provisions therein	40
On barn, &c., adjoining.....	300
On grain therein.....	400
On driving house, &c.....	200
On horses, carriages, &c.....	200
	<hr/>
	\$1930

And the policy witnessed that the Company "should be liable to pay to the said George King, &c., *two-thirds of all such loss or damage by fire as shall happen to the above mentioned property, amounting to no more in the whole than the sum of \$1930, currency, and to no more on any of the different properties above described than two-thirds of the whole cash value of each at the time of such loss, and not exceeding on each the sum it is insured for in this policy.*"

The defendants insisted that they were not bound to pay over two-thirds of either of these amounts of loss.

The plaintiff, on the other hand, urged that two-thirds of the loss meant two-thirds of the whole loss, which was \$ and not exceeding two-thirds of the cash value of all or even of each article.

A verdict was found for the plaintiff; but as to two items of claim leave was reserved to move to reduce the verdict by \$58, on the ground that defendants were not liable to pay more than two-thirds of the loss on each subject of insurance.

C. S. Patterson obtained a rule *nisi* accordingly, to which *S. Richards, Q. C.*, shewed cause.

HAGARTY, C. J.—If the whole property should be destroyed the Company was to pay \$1930, but only if that sum amounted to two-thirds of the actual value of each at the time of fire.

There were, so to speak, about eight separate insurances under this contract.

In no case could a larger amount than the sum separately specified be recovered on any one subject. In the case of the furniture the sum insured was \$150, the loss \$140, the cash value admitted to be more than one-third more than the sum insured. So, with the item of provisions, the sum insured was \$40 the loss \$39.

Now, as to the furniture, it is clear no more than \$150 could in any case be recovered: this is expressly provided. The plaintiff's loss on furniture was \$140: the contract is to pay two-thirds of all such loss or damage by fire as shall happen to the above mentioned property, amounting to no more in the whole than \$1930. I think "the plaintiff's loss" means his loss against which he has insured, that is, \$140 on furniture. He has lost no more and cannot recover more in respect thereof; but the Company contract to pay, not that loss, but only two-thirds of it, leaving him to bear the remaining one-third himself.

If nothing but the furniture had been damaged, the whole of plaintiff's loss would have been simply on this item of insurance. I cannot see how in such a case he could urge that, because he had a large insurance on other heads, his loss on this head should be free from the two-thirds limitation: in this way he would be paid for the whole loss he had sustained, contrary, I think, to the meaning of the contract.

I am of opinion the two-thirds clause must be applied to each separate subject of insurance, and that the rule must be absolute, and, as the defendants had to make this motion, they must have the costs thereof allowed against plaintiff's costs.

GWYNNE, J.—The word "property" in this printed form, prepared for general use, is in this particular policy divi-

sible, and applies to each of the properties enumerated, each being the subject of a distinct insurance. It is to be read as if the word used in the recital was "properties" (in the plural), comprising several distinct subjects of insurance, and not "property," in the singular, as if there was but one subject or unit of insurance represented by the sum of \$1930, as contended by Mr. Richards. This I gather to be the true construction from the whole tenor of the policy. It witnesseth that the Company shall be liable to pay two-thirds of all *such* loss or damage by fire as shall happen to the above mentioned property (read "properties"), amounting to no more in *the whole*, that is, if all the properties be lost or damaged, than the sum of \$1930; but if one or more of the properties, less than the whole, suffer loss or damage, then "to no more on *any* of the different properties above described than two-thirds of the 'actual value of each at the time of such loss.'" Observe the expression here: "any of the different properties," designating each as a separate property within the meaning of that term used in the recital, and thus shewing that the term "property," as used in the policy, is divisible in the manner I have said. Then again, observe the expression "two-thirds of the actual value of *each* at the time of such loss." The actual value of each what? Why, clearly, as it seems to me, of each property *lost* or damaged, not *insured*; the value being estimated at the cash value at the time of the loss, not at the time of the risk being taken: in other words, "two-thirds of the *loss* on each; such loss being to be estimated, not according to the value of the property lost or damaged, as estimated in the policy, but the value at the time of the loss, and "not exceeding on *each* the sum *it is insured for* in this policy; clearly, by these words, "each" and "it" in this context, conveying that *each* property is the subject of a separate insurance.

Then, the policy proceeds with a proviso, which puts the case, if possible, in a clearer light—"In case any insurance should exist or be effected on the premises or property insured with any other person or office, then this company

shall only pay two-thirds of a ratable proportion of any loss or damage along with such other" (insurer). Surely, the word "property," as used here, must be construed as divisible. Surely, to give this clause effect, it is not necessary that the *whole* of the property shall be insured by *one* insurer. It must equally apply, if one or other of the properties be insured in one or more other offices, and another in a different office, and another not insured elsewhere at all. In such a case suppose a part only of each of the subjects of these separate insurances to be lost; then, clearly, the other separate insurers can only be liable in respect of loss upon that property upon which they have respectively effected insurances, such other insurer for the loss only on that property upon which he has effected an insurance; but in such case this company shall pay only two-thirds of a ratable proportion of such loss; that is, of the loss on *each* subject separately insured elsewhere. Why, then, should this company be only liable for two-thirds of a ratable proportion of the *loss* on *each* subject of insurance, where there are other insurances, if their liability is not to be limited to two-thirds of the *loss* on *each*, where there is no other insurance? I think the policy cannot be construed to have a double aspect in this respect. If Mr. Richards' argument be correct, this company, though conjointly with other insurers of separate properties liable only to pay two-thirds of a ratable proportion of the *loss* on *each*, might still be held liable to pay the full loss on one or more of the subjects of insurance, if they are the sole insurers.

Then, looking at the conditions of insurance endorsed on the policy, we find in the 9th condition the word "property" again used in a sense which must be taken divisibly. It provides that, "in case of loss or damage by fire, it shall be the duty of the insured to use their best endeavours to save and preserve *the property*." Surely this duty extends over *each* property, and so the word must be construed divisibly. If the word "property" be so construed wherever it occurs, as I think it should be,

the case is free from doubt, and the policy constitutes a separate insurance on *each* subject, imposing a liability on the company to the extent only in each case of two-thirds of the *loss* on *each* subject, not exceeding the risk taken on each.

Then, at clause 15 of the conditions, we find a provision that "not more than two-thirds of the estimated cash value of buildings "or other property shall be *insured* by this company."

Construing this condition with the policy, I take the whole to convey that the company will not *take* a risk on any property to any greater amount than two-thirds of its estimated cash value at the time of the taking the risk, and that it will not pay more than two-thirds of the cash value of the *thing lost* or damaged, estimating the part lost or damaged by its value *at the time of the loss*.

J. WILSON, J., concurred.

Rule absolute to reduce verdict.

HARTSHORN V. EARLEY.

Ejectment—Proof of tenancy for years under plaintiff—Lease by infant—Avoidance during minority—Notice of title.

Defendant, not admitting plaintiff's title, but allowing him to prove it at the trial, without, however, cross-examining his witnesses, or otherwise taking objection to the title as proved, is at liberty to shew title under the plaintiff as tenant for years.

The doctrine established by *Pettigrew v. Doyle*, 17 C. P. 34, 459, as to the proper notice of title, when plaintiff claims by reason of forfeiture of a term, applies also to a plaintiff claiming to avoid his lease on the ground of infancy.

Semble.—An infant cannot, during his minority, avoid on the ground of infancy, a lease which is for his benefit.

This was an action of ejectment, tried at the last Fall Assizes, at Cobourg, before Hagarty, C. J.

The plaintiff claimed ;

1. By length of possession.

2. By chain of deeds set out to George C. Hartshorn; by descent from him to George Hartshorn, his heir, and to plaintiff, as heir to George Hartshorn.

Defendant, William Earley, asserted title in himself, as tenant to Francis Earley, who claimed by lease from plaintiff.

Francis Earley claimed under lease from plaintiff to him.

Nothing was said at the opening of the case as to the relation of landlord and tenant, nor was defendant asked to admit plaintiff's title. Evidence was given of plaintiff's husband dying in possession, leaving an infant, who died a few months after him. Plaintiff's mother was asked what was plaintiff's age, and in answer said she would not be 21 till May next.

This was plaintiff's case: her witnesses were asked no questions by defendant's counsel.

On the defence, letters of guardianship were produced and proved, appointing plaintiff guardian of her infant son, and dated 22nd February, 1867. The petition, therefore, was dated 5th February, 1867. A lease of this land was then produced, dated 5th February, 1867, and was from plaintiff to defendant, Francis Earley, for 10 years from date, at a rental of \$125. It did not mention her as guardian, and contained the usual covenants.

Then it was objected for plaintiff that defendant could not prove a tenancy, as plaintiff had to prove her title; but the evidence was admitted.

The defendant executed the bond for plaintiff, as guardian, and the lease bore date the day her petition for the letters was sent in.

Plaintiff then objected that, as the evidence shewed her to be an infant at the execution of the lease, she had avoided it by the bringing of this action, and further that, if it were given as guardian, it expired on the death of the infant before this action was brought.

For defendant it was urged that this alleged avoidance

was not open to plaintiff on her notice of claim, and *Pettigrew v. Doyle*, 17 C. P. 34, 459, was relied on; further, that a minor could not avoid a lease, as reserving rent for her benefit, during minority; that a demand was necessary, as it was, at most, a tenancy at will.

Plaintiff asked to amend her notice of claim, which was refused, defendants insisting they had not come prepared to try her alleged infancy.

It was argued that there should be a verdict for defendant, with leave to plaintiff to move to enter a verdict for her, if the Court should think, on the record, notices, evidence, and objections, she could recover, with power to draw inferences.

It should be added that, when plaintiff's witness was asked about her infancy, it was objected that it was not relevant to the case at the time.

Lowe obtained a rule *nisi* on the leave reserved.

J.D. Armour, Q.C., shewed cause, citing *Zouch v. Parsons* 3 Burr. 1794; *Madden v. White*, 2 T. R. 159; *Slater v. Trimble*, 14 Ir. C. L. Rs. 342; *Featherstone v. McDonell*, 15 C. P. 162; *Pettigrew v. Doyle*, 17 C. P. 34, 459; *Orser v. Vernon*, 14 C. P. 573; *Doe Lewis v. Cawdor*, 1 C. M. & R. 398; *Doe Bennett v. Long*, 9 C. & P. 773; *Jones v. Mills*, 10 C. B. N. S. 788; *Houghton v. Thompson*, 25 U. C. 557.

C. S. Patterson, contra, cited *Thompson v. Falconer*, 13 C. P. 78; *Canada Co. v. Weir*, 7 C. P. 341; *Platt*, Leases, 28; *Woodfall*, L. & T. 39.

HAGARTY, C. J., delivered the judgment of the court:

We have first to consider the objection, that, as plaintiff had to prove her title, defendant could not set up a tenancy under her. Adhering to the decision we have given this term, in *Wilson v. Baird*, (*) we would have to carry the

(*) Ante p. 98.

practice much further, if we apply it to this case. Defendants by their notice simply claimed as tenants. They were not asked at the trial to admit or deny plaintiff's original right; they asked no questions of her witnesses, and took no exception to her title proved. I am not prepared, on this state of facts, to say that defendants could not offer proof of a sealed demise from plaintiff to one of themselves for a term of years. No doubt the defendants might at the trial have offered to admit the original title, and claimed the right to begin under proof of the lease.

I have found no case where, under facts such as occurred here, the defence was refused, and I am not prepared to go beyond former decisions. Most of the authorities are to the effect that a defendant, after putting plaintiff to proof of title and raising objections thereto, cannot then insist on a right to notice to quit or demand of possession, as in *Doe Maitland v. Dellabaugh* (5 U. C. 214). The practice, as far as I understand it, seems to rest on the principle of disclaimer; that the course taken by a defendant, in compelling plaintiff to prove a title, amounts to a disclaimer. Here it can hardly be said that defendants compelled plaintiff to any particular course. They simply said nothing and raised no objections, and were not asked to admit anything. I cannot hold them debarred from shewing their title under an existing lease for years. I refer to *Doe Bennett v. Long* (9 C. & P. 173), and as to demand of possession, to *Jones v. Mills* (10 C. B. N. S. 797).

If then the lease be admitted, can plaintiff, under her notice of title, be allowed to impeach or avoid it on the ground of infancy? I think I must hold that she cannot do so, under *Pettigrew v. Doyle* (17 C. P. 34), confirmed in *Error* (Ib. 459). I cannot fritter away that express decision by distinctions so fine as Mr. Patterson has sought to draw. If plaintiff cannot raise the question of infancy of course her claim fails. It may be right to add that, according to modern authority, it would seem that an infant cannot during infancy avoid a lease made, reserving a rent, for his or her benefit. There is an express decision to that effect,

14 Irish C. L. Repts.; and the law is so stated on the authority of that case in the 1867 edition of Woodfall's Landlord and Tenant, 40-41.

A passage in *Co. Lit.* 380 b. is usually cited to the contrary effect, and was under the notice of the Irish Court; and in *Maddon v. White* (2 T. R. 161) that very learned Judge Buller says: "Notwithstanding the decisions in *Co. Lit.*, which is also laid down in Brownlow, I will freely own that I am of opinion against the lessor of plaintiff on the other ground; for all the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit;" and he cites from Mr. Dunning's argument in *Zouch v. Parsons*, and that "Lord Mansfield, in *Drury v. Drury* (5 Bro. Parl. Cases, 570), laid it down as a general principle, that if an agreement be for the benefit of the infant at the time, it shall bind him; and Lord Hardwicke afterwards adopted this rule."

Rule discharged.

CARTER V. NIAGARA DISTRICT MUTUAL INSURANCE CO.

Insurance—Condition requiring particular account of loss—Noncompliance

One of the conditions of the policy in this case required the insured within thirty days after loss "to deliver in a particular account of such loss or damage, signed by their own hand and verified by their oath or affirmation, and by their books of account and other proper vouchers."

The plaintiff sent in his affidavit, stating in general terms the value of the different kinds of goods destroyed, but without in any way mentioning his loss on the buildings insured, the mere statement as to them being that they had been totally destroyed, and without verifying his deposition by his account books or other proper vouchers:

Held, following *Greaves v. Niagara District Mutual Insurance Company*, 25 U. C. 127, clearly no compliance with the condition, and a non-suit was therefore ordered to be entered.

This was an action on a policy of insurance, in which the plaintiff claimed \$1000 on a brick dwelling house, \$550 on a frame store, \$2000 on dry goods, \$800 on groceries and provisions, \$800 on hardware and crockery, and \$400 on boots and shoes.

The defendants pleaded 1st. *Non est factum*.

2ndly, That the policy was subject to certain conditions endorsed thereon, amongst which was the following: "All persons insured in this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and within thirty days after said loss to deliver in a particular account of such loss or damage, signed by their own hand and verified by their oath or affirmation, and by their books of account and other proper vouchers. They shall also declare on oath whether any or what other insurance or incumbrance has been made on the same property;" and the defendants said that the plaintiff did not, after the alleged loss or damage by fire, forthwith give notice thereof to the defendants, and within thirty days after said loss deliver in a particular account of such alleged loss or damage, signed by his own hand and verified by his oath or affirmation, and by his books of account and other proper vouchers, whereby the said policy became void.

Issue.

The case was tried at Welland, before J. Wilson, J., in November, 1868.

It appeared that a fire occurred in an adjoining building on the morning of the 12th October, 1867, which spread to the plaintiff's dwelling house and store. The plaintiff put in the policy, which was admitted, and which contained the condition as the defendants had pleaded it.

Plaintiff called upon defendants to produce an affidavit made by plaintiff to support his claim. It was in these words: "I, Lewis Carter, of the village of Port Colborne, in the county of Welland, merchant, make oath and say as follows: 1st. That on the morning of the twelfth day of October last, the brick dwelling house and frame store, insured by and mentioned in policy No. 11,147, of the Niagara District Mutual Fire Insurance Company, dated the fifteenth day of December, A.D. 1864, and granted to me, were totally consumed by fire. 2nd. That the said fire originated in the adjoining premises owned and occupied by one Samuel Hipkins, and communicated and

extended to my said house and store. 3rd. I further say that I had a large stock of dry goods, groceries and provisions, hardware, crockery, boots and shoes in the said store at the time it was burnt, covered by the said policy. 4th. I further say such dry goods were consumed and damaged by such fire to the value of about \$4000; that I lost by such fire groceries and provisions to the value of \$1400. I also lost by such fire hardware and crockery of the value of at least \$1400; and no less than \$600 in boots and shoes, destroyed and damaged by such fire," &c.

At the close of the plaintiff's case a non-suit was moved for :

1st. Because there was no proof of notice of the loss by fire given by plaintiff to defendants.

2nd. No proof of the particulars of loss, signed and verified as in the condition and plea mentioned.

Leave was reserved to move on these grounds and the case proceeded. The jury found a verdict for plaintiff and \$5550 damages.

Galt, Q. C., obtained a rule *nisi* to set aside the verdict and enter a non-suit, pursuant to leave reserved, on the ground that the plaintiff did not shew a compliance on his part with the condition set forth in the second plea of defendants.

Harrison, Q. C., shewed cause, citing *Cameron v. Times & Beacon Ins. Co.*, 7 C. P., 234; *Langel v. Mutual Ins. Co. of Prescott*, 17 U. C., 524; *Cinq Mars v. England Ins. Co.*, 15 U. C. 147, 246; *Mann & Hobson v. Western Ins. Co.*, 17 U. C. 190, 19 U. C. 340; *Platt v. Gore District Mutal Ins. Co.*, 9 C. P. 455; *Niagara District Mutual Fire Ins. Co. v. Lewis*, 12 C. P. 123; *Angell*, Insurance, 2nd ed. sec. 240; *Scott v. Niagara District Mutual Ins. Co.*, 25 U. C. 119; *Mulvey v. Niagara District Ins. Co.*, 25 U. C. 424, 428; *Lampkin v. Ontario Marine Insurance Co.* 12 U. C. 578; *Cameron v. Monarch Ins. Co.*, 7 C. P. 212; *Date v. Gore District Ins. Co.*, 14 C. P. 549.

Galt, contra, cited, *Greaves v. The Niagara District Mutual Ins. Co.*, 25 U. C. 127.

WILSON, J.—It is much to be regretted that in a case like this, where the plaintiff has suffered great loss, his claim should be jeopardized, if not defeated, for want of reasonable care in complying with the conditions upon which the claim rested. It is precisely like the case of *Greaves* against the same defendants, and the observations of the learned Chief Justice apply with peculiar force here.

The simple question raised in this case is whether the affidavit which the plaintiff put in was a compliance with the conditions in the policy mentioned in the second plea. Following the case just referred to, we think it is not. The value of the dwelling house and store is not mentioned, nor the amount of loss the plaintiff sustained by their destruction; and as regards the plaintiff's stock of goods the statement is of the most general character. It contains "no particular account" of the loss or damage, and is not verified by his books of account and other proper vouchers.

There was an account delivered to defendants: when does not satisfactorily appear; but it was not relied upon, for it was neither signed nor sworn to, and contained some items not covered by the policy, and which rather tended to shake confidence in the good faith of the claim.

As in the case relied upon by the defendants, we cannot hold that upon this state of facts there was any evidence of compliance with the conditions in letter or substance, as to the verification of the list or particular account. We therefore think the rule to enter a non-suit must be made absolute.

HAGARTY, C. J.—I concur in the result arrived at by my brother Wilson.

It is impossible for us to accede to the plaintiff's argument, without directly over-ruling *Greaves* v. this Company (25 U. C. 127), *Bunting* v. same parties (Ib. 431), and several other equally strong authorities. The affidavit furnished by plaintiff cannot, I think, be considered a compliance with the conditions to give "a particular account

of any such loss or damage, signed by his own hand and verified by his oath or affirmation and by his books of account and other proper vouchers." His loss on the building is not in any way mentioned. He simply says that his brick dwelling house and framé store, insured by and mentioned in policy No. 11147, dated 15th Dec., 1864, were totally destroyed by fire. His loss thereon is not stated in any way. It may have been one-tenth the amount insured, as we cannot assume it was worth the whole amount; and as to the goods, even if the account be sufficiently "particular," there is no attempt to support it by vouchers or proof from books.

I do not agree with plaintiff's suggestions, that the sufficiency of his written compliance with the condition is to be wholly a matter of fact for the jury: that would be leaving them to construe the written statement: it would not in any way be a matter of disputed fact.

The authorities seem very clear that the argument as to waiver cannot be successfully urged here. See *Scott v. these defendants* (25 U. C. 123). As was well pointed out by Draper, C. J., in *Bunting v. these defendants*, the condition is especially reasonable in its requirements, and being reasonably construed, "it is a condition which no prudent or 'honest man could object to, and one which we have no 'disposition to fritter away.'"

GWYNNE, J.—I quite agree that the rule in this case must be made absolute for a non-suit. We cannot hold otherwise without over-ruling all the cases decided upon this subject.

It was contended that the Company were bound to know the way that the insured transacted his business. In this doctrine I cannot concur; but, granting it to be correct, it may afford a stronger reason for the Company peremptorily insisting upon the fulfilment of this condition.

Parties who know that they are liable to be held to a strict performance of the condition, will be induced probably to transact their business in a more careful manner.

It was further contended that the evidence shews that it was impossible, from the books which the plaintiff kept, for him to have given any better account than he did furnish; but the condition is not that he shall furnish as particular account as he can of his loss, or as the mode which he adopts in conducting his business will admit of; and if he does not keep such books as will enable him to furnish such an account as the condition endorsed on the policy calls for, that is his fault and not the fault of the Company. But the evidence by no means satisfies me that he might not have furnished a much more particular account, and his conduct, as described in the evidence, when the agent of the Company was making inquiries into the particulars of the loss, exposes him, to say the least, to the suspicion that he was endeavoring to prevent the Company obtaining any more particular account than he had chosen to furnish. Finally, it was contended that the insurance is divisible, and that, as to the buildings, the plaintiff is entitled to succeed, if not for the goods; but the condition endorsed on the policy is unfulfilled as to the buildings also, for the account furnished does not supply any statement upon oath, as required, of their value, which is equally a part of the condition, subject to which the insurance was effected. As to the suggested waiver of the condition by the Company, I can see nothing in the evidence to justify us in adopting this suggestion.

Rule absolute to enter non-suit.

MCCLURE V. GRAFTON, *et. al.*

Covenant for quiet enjoyment—Claim by dowress—Payment before judgment or eviction—Pleading.

Plaintiff sued defendants as executors of one Thomas Grafton, setting out that the latter and one James Grafton sold certain land to plaintiff, and that Thomas Grafton covenanted for quiet enjoyment as against the vendors or any person claiming or to claim under them or either of them: *Breach*, that afterwards, while plaintiff was in possession, one F. G., lawfully claiming under James Grafton, as his widow, to have dower in said land, and having good title to have her dower, &c., &c., made her claim to said dower against plaintiff, as tenant in possession, and threatened to evict and would have evicted plaintiff from one-third of the land; and plaintiff, in order to protect himself from eviction, was compelled to pay and did pay \$150, and he was thereby greatly disturbed, &c., and not able to quietly enjoy, &c., and in consequence plaintiff was damnified, &c., and compelled to pay said sum and other large sums to compromise and settle the claim of said F. G., and in procuring a release from her, &c., &c.:

Held, on demurrer, declaration good; for that plaintiff was not obliged to have delayed settling the claim of F. G. until a judgment in dower had been obtained by her against him, much less until he had been evicted by her from the land.

Plaintiff sued defendants as executors of Thos. Grafton, deceased, in covenant, charging that testator and one James Grafton had sold land to plaintiff, covenanting for quiet enjoyment as against themselves or any person claiming or to claim under them: *Breach*, that afterwards, while plaintiff was in possession, one F. G., lawfully claiming under James Grafton, as his widow, to have dower in said land, and having good title to have her dower assigned thereout, as the widow, &c., &c., made her claim to said dower against plaintiff, as tenant in possession, and threatened to evict and would have evicted plaintiff off and from one-third of said land; and plaintiff, in order to save himself from said eviction, was then compelled to pay and did pay \$150, to prevent himself from being evicted and dispossessed, and he was thereby greatly disturbed and interrupted, and was not able to have quiet possession, &c., &c.; and in consequence of such hindrance, interruption, &c., plaintiff had been damnified and put to great trouble and cost, and had been compelled to pay said sum and other large sums, &c., in and about compromising and settling

the claim of said F. G., and procuring from her a release of said dower, and procuring quiet and peaceable possession.

Demurrer : That no eviction of plaintiff, in consequence of claim for dower, was alleged, nor that any judgment was recovered by the widow.

R. A. Harrison, Q. C., for the demurrer, cited *Cuthbert v. Street*, 9 C. P. 115, 117; *Shep. Touch.* 171; *Kennedy v. Solomon*, 14 U. C. 623; *Gibson v. Boulton*, 3 C. P. 407; *Hamilton v. Cutts*, 4 Mass. 349; *Hunt v. Cope*, Cowp. 242; *Reynolds v. Buckle*, Hob. 326; *Lansing v. Vanalstine*, 2 Wend. 563, *Note*; *Carpenter v. Parker*, 3 C. B. N. S. 206; *Hany v. Anderson*, 13 C. P. 476, 483; *Rawle Cov.* 242, 246. *Platt Cov.* 322, 326.

Fleming, contra, cited *Jones v. Morris*, 3 Ex. 742; *Rawle Cov.* 283.

HAGARTY, C. J.—The point for decision is whether a sufficient disturbance or interruption is averred.

The demurrer admits the claim of the dowress to be well founded, but seems to insist that an actual eviction, or, at least, a judgment recovered for the dower, is necessary.

Can a claim to one-third of the land conveyed to plaintiff, admitted to be a perfectly good claim, be bought in and settled by covenantee, without ripening into a judgment, or enforced by compulsion of law?

If defendant's argument be sound, a covenantee can never prevent the incurring of costs by promptly yielding to and obtaining a release of a claim admitted to be irresistible.

Hodgins v. Hodgins (13 C. P. 146) seems in point. It was on a covenant for quiet enjoyment. Eviction was averred and proved by a dowress, with other damages. The plaintiff claimed the costs he had to pay the dowress and his own costs of defence. Draper, C. J., says: "It appears demand in writing, under the dower act, had been made on the plaintiff one month before action, and the action was thereupon brought within time, so as to enable demandant to recover her costs. I think, on receipt of that demand,

the said plaintiff should without delay have complied with it: the only object of the demand was to give him the opportunity of assigning the dower without action. There is nothing suggested to the Court on this point as a reason for contesting the widow's claims. The right of the demandant has been established, and for all that appears was known to the now plaintiff, or might have been, on enquiry, after the demand was served on him. The demandant's, costs and those of the defence against her claim, seem to have been needlessly incurred, and therefore should not be charged against testator's estate."

The learned Chief Justice was evidently of opinion that it was not necessary to let the claims ripen into judgment, much less to result in eviction, or in fact that any legal expenses should have been incurred.

In *Stubbs v. Martindale* (7 C. P. 52) the question was also whether the costs of defending an action, brought by one having lawful claim, could be recovered as damages, and in the judgment *Rawle* on covenants is cited (page 122): "The rule is well settled to this extent, that, as it would be expecting too much of a purchaser to decide at his peril on the validity of a title set up in opposition to that which his vendor undertook to convey, the former should be allowed, by way of damages, the taxed costs of any action by which he has reasonably sought to maintain or defend that title." *Clark v. Robertson* (8 U. C. 370) suggests the same question; as also *Breman v. Servos*, (same vol. 19). *Stuart v. Mathieson* (23 U. C. 135) follows. It was an action on a covenant like this, averring eviction by a dowress. The question was whether covenantee could recover the costs paid to her and his own. At trial it was held that he could not; but the Court held that, as it did not appear the suit was unreasonably defended, the costs could be recovered.

Smith v. Compton (3 B. & Ad. 189 & post 407) is generally referred to as the leading authority. The declaration, on covenant for title, stated that one E. F., being lawfully entitled, brought a plea of formedom in remainder against

the plaintiff for recovery of the premises, and plaintiff, to prevent being dispossessed and to perfect his title, was obliged to pay £550, &c., &c. The case was argued on demurrer by Sir W. Follet & Platt, but nothing was said as to either judgment or actual eviction being necessary. Afterwards the question was if plaintiff could recover as well the money paid as also the costs of the action of form-edom, and, at all events, without notice to covenantee.

Lord Tenterden says: "The only effect of want of notice is to let in the party, who is called on for an indemnity, to shew that the plaintiff has no claim in respect of the alleged loss or not to the amount alleged, that he has made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given him."

In *Short v. Kalloway* (11 A. & E. 31) Lord Denman says, "No person has a right to inflame his own account against another, by incurring additional expenses in the unrighteous resistance to an action which he cannot defend."

In *Hunter v. Johnson* (14 C. P. 428) the question also was if covenantee could recover the costs paid a dowress and the costs of the defence. The Court held that, as the right of the dowress clearly appeared, the defending her suit was unjustifiable and costs not recoverable.

In *Rawle on Covenants*, page 277, a form from *Wentworth's Pleading* is given in an action for quiet enjoyment: *Breach*—That defendant let the ground rent fall in arrear, whereby plaintiff was called upon to pay and forced to pay and did pay, &c., in order to prevent his goods and chattels from being distrained, &c., &c.

Mr. Rawle's review of the American authorities (at page 291) shews clearly that, "In accordance with their principles, it has been held that a purchase by a covenantee of an outstanding paramount title, when that title is actually asserted, will constitute such an eviction as will entitle him to damages upon his covenant for quiet enjoyment or of warranty." We refer to pages 188, 277, 280, 281, 289, 291.

In *Foster v. Pierson* (3 T. R. 620) it was held sufficient, on demurrer, to aver an eviction by rightful title, without stating it to be by process of law.

The numerous cases in England and our own Courts, on the right to recover costs, would be meaningless if defendant's argument prevail, that there must be an actual eviction, or judgment, at least. When, as Rawle says, there is no judgment at law, "the covenantee retired at his peril, with the burden of proving that the adverse title was one to which he could have been compelled to yield."

In *Fairbairn v. Hilliard* (27 U. C. 111) the Court held, on the authority of *Hickman v. Machin* (4 H. & N. 716), that in a case of landlord and tenant notice by mortgagee, "coupled with attornment, is in substance equivalent to eviction, because the tenant is not bound to resist, and in such case the tenant may plead eviction."

We do not, however, decide this case on the authority of the cases between landlord and tenant and mortgagee, which rest on a somewhat peculiar footing.

Since writing these remarks I have read the case of *Lock v. Furze* (19 C. B. N. S. 96), confirmed in error (Law Rep. 1 C. P. 441), where the declaration states that A. B., lawfully claiming and having good title, claimed and threatened to oust plaintiff from the possession, and plaintiff was forced and obliged to take a lease from him, &c. The case was strongly contested, but no objection raised as to this point.

We think the plaintiff is entitled to judgment.

Platt on Covenants, 326, 327, and *Ludwell v. Newmans* (6 T. R. 458) also support the view we take.

GWYNNE, J.—I have entertained no doubt that it is not necessary for a person, having a covenant for quiet enjoyment, to wait until a judgment shall be recovered against him for the possession, and actual expulsion from the premises, or a part thereof, by process of law, shall take place, before he can institute an action upon the covenant. The institution of a suit against the covenantee for the

purpose of evicting him completes his cause of action. The cases cited by the Chief Justice clearly establish this position; to which may be added the case of *Lanning v. Lovering* (Cro. Eliz. 916), where it was held that the institution of a suit for tithes was a breach of a covenant for quiet enjoyment discharged of tithes. But I have doubted whether an actual entry, or a suit, was not necessary to complete the cause of action; whether a claim, not accompanied by an entry in assertion of the claim, by a person having lawful title, but accompanied with a threat to institute an action to enforce the claim, constitutes a breach of the covenant until the threatened suit be commenced. However, upon a more thorough consideration of the principle upon which a tenant may plead, to his landlord's demand for rent, payment to a ground landlord, or other incumbrancer, having claim paramount to that of the immediate landlord, leads me to the conclusion that my doubt has not been well founded.

That principle is, that the payment, upon the demand being made, there being no legal right to resist it, is deemed as compulsory, and, being such, it is in law regarded as a partial eviction: *Jones v. Morris* (6 Ex. 742); *Graham v. Allsopp* (3 Ex. 186); *Taylor v. Zamira* (6 Taunt, 524); *Sapsford v. Fletcher* (4 T. R. 511); *Pope v. Biggs* (9 B. & C. 256); *Hickman v. Machin* (4 H. & N. 720); *Fairbairn v. Hilliard* (27 U. C. 111).

This principle, it appears to me, on reflection, must equally apply between vendor and vendee, where the vendor gives a covenant for quiet enjoyment. In the case of the tenant, his immediate landlord is bound to protect him from all paramount claims. Here the claim for dower was a claim covered by the covenant: it is admitted upon the record to have been a legal claim: it was therefore an irresistible title, and the defendant is by the covenant bound to protect the plaintiff. Nothing could have been gained by attempting to resist the claim, any more than in the case of the tenant and the superior ground landlord, or other incumbrancer, having paramount claim. As between

the vendee and the widow, having lawful title to dower, claiming her dower, the vendee is bound to submit equally with the tenant, upon whom a demand for the rent is made by the person having paramount title. The cases, therefore, in principle appear to me to be the same.

In *Hodgins v. Hodgins* (13 C. P. 150) this Court refused to give to a plaintiff, suing upon a covenant for quiet enjoyment, the costs of resisting the claim, Draper, C. J., saying that in that case it was clear that, on the demand being made, it was needless to resist, as there was no doubt as to the title. Here it is admitted on the record that the title of the demandant in dower was perfect. I concur, therefore, that this declaration discloses a good cause of action, and that the demurrer should be overruled.

WILSON, J., concurred.

Judgment for plaintiff on demurrer.

DECEW V. CLARK.

Written contract—Construction—Misdirection.

Under a written contract, entered into between plaintiff and defendant, plaintiff agreed to deliver to defendant 60,000 merchantable oil barrel staves, *subject to the culling of one S.*, and defendant was to pay for the staves at a rate named. Plaintiff sued defendant on this contract, basing his right to recover upon the delivery by him under the contract of the staves, which he alleged to have been duly culled by S. Defendant pleaded (as the Court intended the plea) that plaintiff did not deliver to defendant, nor did defendant accept from plaintiff, *staves which had been culled by S.*, to any greater extent than 52,479, to which amount payment was pleaded; but at the trial he rested his case, as to the residue of the staves, claimed by plaintiff to have been delivered, solely upon the fact that these latter were not merchantable staves, although they had been approved by S:

Held, affirming the judgment of the County Court, that the culling of S. must be taken as conclusive between the parties under the contract, and that it was not competent for defendant, upon the issue joined, to raise any question as to the quality of the staves after approval by S.

Appeal from the County Court of the County of Norfolk.

The plaintiff declared against the defendant, for that the defendant, in consideration that the plaintiff would furnish to the defendant a quantity of merchantable oil barrel staves, not to exceed 60,000, to be delivered, as the defendant might direct, at the towns of Woodstock or Ingersoll, which said staves were to be culled by one George Sommers, promised to pay the plaintiff \$12 per 1000 of said staves, as they *were made and culled*, and the further sum of \$8 per 1000, as they were delivered as aforesaid; that the plaintiff, in pursuance of the agreement, did deliver to the defendant, as directed by him, a large quantity, to wit, 60,000, of merchantable oil barrel staves, which *were duly culled* by the said George Sommers, and all things had happened, &c., to entitle plaintiff to performance of defendant's promise; yet defendant had not paid, &c., but had refused to pay said money or any part thereof.

2nd Count—Common money counts and account stated.

To this declaration the defendant pleaded, as to \$1049.50, parcel of the moneys in the first count mentioned, payment of that sum, which the plaintiff accepted and received in full satisfaction and discharge for 52,479 staves in the first count mentioned; and as to the residue of the first count, that the plaintiff *did not deliver to the* defendant the said merchantable oil barrel staves, *nor were the same culled* by the said George Sommers, *nor accepted* by the defendant, over the amount of 52,479 staves.

To the second count he pleaded *nunquam indebitatus* and payment.

Upon these pleas issue was joined and the case proceeded to trial, in the County Court, in June, 1868.

The plaintiff called several witnesses to prove the delivery of staves to the defendant, and evidence was given to the amount of 58,479. He produced the contract, which was in writing and signed by plaintiff and defendant, and was to the effect set out in the declaration.

George Sommers, being called by the plaintiff, stated that he had culled the staves under the contract; that the culling was done in the woods and on the road side, in

the usual way; that there were 58,865 after culling; that 32 inches was the length of an oil barrel stave; that the contract was submitted and read to him, and he was instructed to do what was fair and right between the parties, and he did so.

Sommers was also called as a witness for the defence, and he then said: "I left the culls where I culled: I believe they are there yet: *some of them I saw subsequently in Clarke's yard.*"

One William James, also called for the defence, testified: "I was in Clarke's employ and piled the staves which were delivered there: when counted there were 52,479 good staves and 4,133 culls: DeCew was present and raised no objection: they" (that is, DeCew and Clarke,) "had met for the purpose of counting and settling: DeCew wished Sommers to do the culling, but Clarke objected: there was a difference between Sommers and myself as to a certain stave: he called it a good stave: I objected because it had a rotten streak in it." The witness further stated that he was in the yard when the staves were delivered; that they were not counted as delivered, but, as each party who drew the culls furnished his lot, they were counted." This witness was cross-examined for the purpose of testing the accuracy of his evidence as to the quantity delivered. The substance of his evidence was that there were only delivered 52,479 good and 4,133 culls, making together 56,612, and he thought plaintiff's witnesses were mistaken, who spoke of more than this.

Hugh McKay, called on the defence, swore that on the 5th May he "was present at a conversation between the parties when an attempt at a settlement was made; amount agreed upon between the parties, as to total staves, was 52,479 good and 4,103 culls; cash advanced, \$1,049.58: \$66.58 was paid as balance due on good staves; two cents paid back; they could not agree about culls; Clarke wished DeCew to take them away, as he could not use them for oil barrels, or to come back in the morning and settle about them." On cross-examination he said, "A receipt was

given; Mr. Sommers was present: I do not think the receipt was in full of all accounts; DeCew might have said, 'I do not receive it in full;' the culls were to be settled in the morning."

The receipt spoken of was not produced.

Sommers was recalled by the plaintiff and he testified: "I was present at the meeting spoken of by last witness: DeCew positively refused to receive the sum spoken of as a settlement in full, but only on account: the receipt was read over in my presence and it stated that it was on account." On cross-examination he said: "52,479 might have been mentioned, but DeCew did not agree that this was the true amount; the money paid was for staves that had been in the country, and was received only on account of contract; I can't tell why DeCew gave back two cents change; McKay did not read over that there were 4,103 culls, neither was the sum of 52,479 agreed upon as the correct number by DeCew; but I am not positive; Mr. Clarke had not his papers there: the figures might have been taken from DeCew's book; I can't say what the quantity was."

At the close of the plaintiff's case it had been agreed between the parties that \$1,049.58 had been paid, which would pay for the 52,479, and that \$119.60 was the balance claimed for the residue, said by plaintiff to be 6,000 staves, and \$9.50 half expense of culling, making \$129.10.

The Judge told the jury that the culling of Sommers must be taken as conclusive between the parties under the contract proved; that as to the \$9.50, though something had been said about it, he found no evidence on his notes of its having been paid by plaintiff, but that they might allow it if they were satisfied it had been paid; that if they agreed with the plaintiff's contention, he would be entitled to a verdict for \$129.10, if they allowed the item of \$9.50; while, on the other hand, if they agreed with the defendant's contention, *he* would be entitled to their verdict.

This charge was objected to, in that part relating to

the conclusiveness of Sommers's culling, *defendant's counsel insisting that it ought to have been left to the jury to say whether the staves delivered were to be considered merchantable staves or not.*

The jury rendered a verdict for the plaintiff and \$119.60 damages.

In the following County Court term a rule *nisi* was obtained to set aside the verdict on the law, evidence and weight of evidence; *and for misdirection in directing the jury that Sommers's culling was to be received as conclusive.*

This rule was, after argument, discharged, when the defendant appealed.

The appellant's grounds of appeal were, that the true construction of the contract was that not only were the staves to be culled by Sommers, but that they were to be good, merchantable staves, and that the act of culling was only an additional, but not a conclusive, test of the quality of the staves; that the evidence shewed that some of the staves, which Sommers rejected, were delivered by the plaintiff, and that Sommers's evidence proved this; that the 4,103 staves culled in Clarke's yard must be taken to have been culled and rejected by Sommers; that there was no evidence that the staves delivered under the contract were the same as culled by Sommers; that the culling ought not to have taken place until after the delivery; that the learned Judge misdirected the jury in telling them that there had been any culling so as to satisfy the contract, and that Sommers' culling was conclusive; that in all the above matters the verdict was against evidence and the weight of evidence.

None of the above points, except the objection to the Judges charge, as to the conclusiveness of Sommers' culling, appear to have been made at the trial, or in the rule *nisi* subsequently obtained.

Dr. McMichael, for the appeal.—The verdict is clearly contrary to law and evidence and ought to have been set aside

by the Court below; and the learned Judge should not have held that the defendant was concluded by the culling of Sommers.

He cited *Ladd v. Bullen* 10 U. C. 295; *Dallman v. King* 4 B. N. C. 105; *Hotham v. E. In. Co.* (1 T. R. 658).

J. A. Boyd, contra.—The only question is whether the Judge was right in telling the jury that the culling of Sommers was conclusive, and it is submitted that under the evidence and facts of the case he was right in so directing them. [HAGARTY, C. J. Strictly speaking, evidence should have been given impeaching the culling of Sommers, though perhaps, there was such evidence].

He cited *Moffatt v. Dickson*, 13 C. B. at pp. 569, 571, 575; *Stodhard v. Lee*, 3 B. & S. 364; *Mills v. Bayley*, 2 H. & C. 36; *Batterbury v. Vyse*, Ib. 42; C. S. C. ch. 46, sec. 29.

GWYNNE, J., delivered the judgment of the Court.

The first point arising on this appeal appears to be, what was the issue joined between the parties upon these pleadings?

After pleading payment and satisfaction as to 52,479 staves, the defendant, as to the residue in the said first count mentioned, says that the plaintiff did not deliver to the defendant the said merchantable oil-barrel staves, save to the number of 52,479, "*nor were the same culled by the said George Sommers, nor accepted by the defendant.*" Literally construed, this plea contains averments that staves, which were *not* delivered to the defendant, were not culled by Sommers, *nor* accepted by the defendant.

The pleader would seem to have inserted this averment of non-acceptance, from an apprehension that the defendant could be made liable under this count, if it should appear in evidence that any staves had been delivered which had not been culled by Sommers, as the contract provided; but in such a state of facts the plaintiff could not have recovered under this count, which avers the fulfilment of the condition mentioned in the contract, namely, the culling by

Sommers. If staves had been delivered, without having been culled by Sommers, I apprehend that the plaintiff would have had to aver some excuse sufficient to dispense with the fulfilment of that condition; as, for example, the death or absence of Sommers, or that defendant had dispensed with that condition, as in *Ladd v. Bullen* (10 U. C. 295), or he would have declared on the common counts for goods sold and delivered, treating the delivery and acceptance under such circumstances as a new contract.

In the count, as it is framed, the plaintiff bases his right to recover upon the delivery by him under the contract of staves which had been duly culled by Sommers, as provided in the contract.

To this breach the plea is, as it appears to me, very inartistically pleaded. If the count had been simply for non-payment of the agreed advances upon the culling, without averring delivery, a plea that Sommers had not culled would be the answer. If the advances had been paid but the residue not, and the fact of delivery of any greater quantity than 52,479 was what defendant disputed, the plea of non-delivery would be the answer. But I suppose that what the plea does intend to set up as a defence is, that the plaintiff did not deliver to the defendant, nor did the defendant accept from the plaintiff, *staves which had been culled by Sommers* to any greater quantity than 52,479. Such a plea, if true, would I apprehend be an answer in substance to the count.

If this be, as I think it is, the issue joined between the parties, then the defendant's contention at the trial should have been to establish that the staves, which the defendant objected to paying for, as not being merchantable staves, were not in fact, and he should have required that the jury should have been asked to determine whether or not they were in fact the staves which Sommers had culled and approved, or whether they were not those which Sommers had rejected as culls. There is one small portion of the evidence which points to this enquiry, but it does not appear to have been pressed for the defendant at the trial;

on the contrary, his chief contention was that, granting them to have been approved by Sommers, they were wrongly so approved, inasmuch as they were not good merchantable staves; and it is to the Judge's charge upon this point only that the point of misdirection was made; yet now, on this appeal, the other point which was not apparently urged at the trial at all, or regarded of any moment, is made the foundation of three of the grounds of appeal.

Sommers does not appear to have been asked whether the culls, which the witness James rejected, after delivery in Clarke's yard, had been in fact rejected, or had been passed and approved by Sommers. It may be that the defendant intentionally abstained from pressing this enquiry, and that he preferred resting the question of his exemption from liability upon the fact of his establishing that the staves were not merchantable staves, although they were approved by Sommers. However that may be, having rested, as I think he did rest, his case upon this latter point alone, he cannot now, after the verdict, be heard to raise upon this appeal any objection not involved in the special one taken to the Judge's charge. From the manner in which the case was submitted to the jury by the defendant himself, and from the nature of the contention at the trial, I think we must now take it that the staves delivered were in fact those which Summers had approved, and as to the difference in quantity between the evidence offered by the plaintiff of 6000 staves, and the 4130 spoken of by defendant's witness, the question was fairly left to the jury: it was a matter of fact for them to determine, and they have determined it by their verdict.

I take it to be clear that, before the plaintiff could recover upon this contract, it would be necessary for him to aver and prove the fulfilment of the condition, namely, the culling of the staves by Sommers. All the authorities from *Morgan v. Bernie* (9 Bingham, 672), including *Dallman v. King* (4 Bing. N. C. 105); *Moffat v. Dixon* (13 C. B. 575); *Stadhard v. Lee* (3 B. & S. 364); *Mills v. Bailey* (2 H. & C. 36); *Batterbury v. Vyse* (2 H. & C. 42); *Andrews*

v. *Bellfield* (2 C.B. N.S. 779); *Scott v. Corporation of Liverpool* (27 L. J. Ch. 641); *Lamprell v. Billericay Union* (3 Ex. 283); *Milner v. Field* (5 Ex. 829); *Grafton v. Eastern Counties Railway* (8 Ex. 699); *Harrison v. Great Northern Railway*, in Exchequer Chamber (12 C. B. 579 609), and many other cases seem to establish this position beyond doubt. The contract is one upon the part of the plaintiff to furnish and deliver staves as approved by Sommers's culling, and on the part of the defendant to pay \$12 per 1000 upon the culling taking place, and the balance of \$8 on delivery. The obligations of the plaintiff and defendant are mutual: *Harrison v. Great Northern Railway* (12 C. B. 601); *Blackstone v. Smith* (2 Ex. 783).

If the plaintiff should be unable to get Sommers to cull the staves, so as to give him a right of action on the contract, by reason of the defendant fraudulently colluding with Sommers to prevent his culling, the plaintiff has his remedy, but not under the contract: *Batterbury v. Vyse* (2 H. & C., 42); *Scott v. The Corporation of Liverpool* (27 L. J., Ch. 641). All the cases, as far as I have been able to collect them, arise upon the question of the ability or inability of the plaintiff to sue without shewing a fulfilment of the condition. This case is the reverse of that, for here the plaintiff rests his right to recover upon the fulfilment of the condition. But in all cases of contract the right to be paid and the obligation to pay are correlative; and so I take the law to be, that, as a plaintiff may recover, though not under the contract, but as in case, against a defendant, who, by fraud and collusion with the referee, should prevent his acting, so a defendant may resist payment under the contract, if he establishes fraud and collusion between the plaintiff and the referee wrongfully to obtain his approval of an article not of a quality *bona fide* to fulfil the contract; but in such a case the *mala fides* and collusion would have to be pleaded. Evidence of such *mala fides* and collusion would not be admissible under a plea setting up, as I think the plea here does, the naked fact whether the staves delivered by plaintiff were those which Sommers had ap-

proved. *Mala fides* in Sommers does not appear to be charged : all the evidence given was, that Mr. James considered that certain staves, which, we are to take it, Sommers had approved, were not of a quality that the contract called for. His judgment may or may not be right; but the answer to such evidence is that the parties contracted that the plaintiff's right to sue should depend on Sommers's judgment and not Mr. James's.

In my judgment, upon the whole, it was not competent for the defendant to raise a question as to the quality of the staves, after they were approved by Sommers, upon the issue joined in this case; and if it were, having regard to the evidence not setting up collusion or fraud between the plaintiff and ⁵/₁₂ Sommers, I think we must read the Judge's charge as having relation to the facts proved, and in that view, in the absence of such collusion, I do not think his charge is open to objection.

The appeal therefore should be dismissed.

Appeal dismissed, with costs.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—BERNARD DEVLIN, WILLIAM MCKAY WRIGHT, EDMUND JAMES BEATTY, JAMES O'LOAN, WILLIAM ROBERTSON CHAMBERLAIN, HENRY WILLIAM MEYER, JAMES EDWARD ROBERTSON, JOHN HENRY SCOTT, JAMES HERBERT TYLDESLEY BLEASDELL, FREDERICK BISCOE, JOHN WILLIAM DOUGLAS, JOHN MCLEAN, ALEXANDER DUNBAR, JAMES STRACHAN CARTWRIGHT, ALEXANDER JAMES CHRISTIE, THOMAS GREY, JOHN WHITLEY, ALEXANDER DEVLIN, WILLIAM MALLOY, JOHN MUIR.

HILARY TERM, 32 VICTORIA, 1869.

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WILSON, J.

“ “ JOHN WELLINGTON GWYNNE, J.

HEYLAND V. SCOTT.

Ejectment—Commission to examine witnesses—Commissioner sworn before ordinary commissioner—Admissibility—Statutes of limitation—Possession of part of land by caretaker.

A commission for the examination of witnesses, and directed to two persons named, provided as follows, “and we give to each of you full power and authority to administer such oath or affirmation to the other.” The sole acting commissioner, instead of being sworn before his fellow commissioner, was sworn before an ordinary commissioner of the Court :

Held, that the commission was admissible in evidence.

The plaintiff, by his counsel, attended before the commissioner sworn in this way, and took part in the examination of the witness produced, without further objection than refusing to consent to the mode of administering the oath :

Quære, whether he could afterwards impeach the validity of the commission.

The possession for twenty years of part of a lot of land by a caretaker, expressly employed to protect the whole, on behalf of one claiming such whole, and which is accordingly so protected from all other intruders, may be a sufficient possession of that whole to establish a title under the Statutes of Limitations, and such possession will not be confined to the part actually enclosed and occupied.

Ejectment for 175 acres of lot 25, 3rd concession, North Norwich.

Plaintiff claimed by deed from Adeline Throckmorton, devisee of Joseph H. Throckmorton, heir-at-law of Harriet B. Burnside, owner in fee.

Defendant Scott claimed by deed from Harriet Burnside to John Powell; John Powell to Alexander Burnside, 1837; Alexander Burnside to Samuel Shaw, 1842; Samuel

Shaw to Thomas Dean ; Thomas Dean to Jasper Wenman, 1844 ; Jasper Wenman to Wm. Osborne, 1849 ; Wm. Osborne to Robert Scott (defendant) ; also by Statute of Limitations.

The other defendants claimed under defendant Scott.

At the trial, at Woodstock, before the Chief Justice of this Court, title was admitted in Harriet Burnside at date of deed by her to John Powell, dated 10th November, 1837.

It was found that Jos. H. Throckmorton was the oldest son of Mrs. Burnside's father, and was her brother. His will was proved, in which there was a general residuary devise to his wife Adeline. It bore date 1st January 1862.

A deed was produced and proved from Adeline Throckmorton to plaintiff, dated 22nd February, 1867.

This was plaintiff's case.

For the defence it was objected that no estate passed by this last deed, under its peculiar wording, and leave was reserved to move to enter a non-suit.

A commission was opened by defendants. It was objected that, though by its terms one commissioner was to swear the other, McDonell, the sole acting commissioner, took the oath in Windsor before a commissioner for taking affidavits in the Superior Courts. The commission was, however, allowed to be read. The defendant then produced his paper title, as set out in his notice.

Samuel Shaw was examined on the commission. He proved the purchase from Burnside in 1842 ; that within a year after the purchase, having heard that the timber was being stolen off the land, he gave authority to a man named " Wires," then working for him in Toronto, and who was moving up to that part of Canada, to take charge of the land and protect the timber ; that he was to pay Wires for doing this either in money or tools.

Wires was dead, but his widow was examined and proved their going up to Norwich about 26 years previously ; that at first they lived for a year or so close to the land, and

then built a shanty on it and lived in it till about four years before the trial; that her husband was to look after the land and take care of it, which he did; that she had a child born on the place, who would be 22 years old in September, 1868; that Wires took care of the lot, and on several occasions prevented people from taking the timber; that he claimed a part of it. There was other evidence, also, as to Wires protecting the lot and professing to do so for Shaw. Proof was also given that Osborne, one of the chain of owners, was aware that a caretaker was on the lot; also of communication between Wires and Dean, who bought from Shaw in 1844.

A great deal of evidence was given to prove the time of Wires going on the lot, the defence endeavouring to prove that it was over twenty years before the commencement of the suit, which was in March, 1867.

Plaintiff, in reply, called evidence to shew that Wires did not move up to Norwich till after the time alleged by defendants' witnesses.

Throckmorton lived five or six miles from the land, and owned the lot immediately opposite to it. In 1846, it was proved he was aware that the Burnsides had sold to Powell. Mrs. Burnside died about 1839.

The plaintiff contended that no sufficient possession was shewn; that Wires's entry was that of a mere trespasser, and his possession covered no more than the part he actually fenced in; that Wires was a trespasser from the beginning; that he had abandoned his possession, and that no transfer by deed was shewn from him to these defendants.

The jury were told that the deed from Dr. and Mrs. Burnside did not pass her estate (the husband alone being the granting party, and the wife merely releasing dower thereby), and that defendant's title had to rest on twenty years' possession; that such possession must be continuous, exclusive, &c. The clause as to entry on wild land and notice to owners was explained to the jury, and it was left to them, as a fact, whether Throckmorton, to whom the legal

estate passed on Mrs. Burnside's death, in 1839, and who owned the opposite lot and knew, at least in 1846, that Burnside and wife had professed to sell to Powell, had notice of the entry by Wires. The usual kinds of possession, or rather the evidence thereof, was suggested to the jury, and they were told that, if a person claiming title to a lot, send a caretaker to live on it and specially to protect the whole from trespassers, and that he do so accordingly, such may be a good legal possession of all so held and protected. This was objected to by plaintiff.

The jury found for defendants.

In Easter Term, *Harrison*, Q. C., obtained a rule against the verdict, on the ground that the alleged possession, by Wires taking possession of a piece of the land not in question in the suit, was not as tenant or under authority of the person claiming title, and could not enure to his benefit; and for misdirection, in telling jury that such possession carried with it the possession of the whole lot, and for improper reception of the commission, the commissioners not having been duly sworn.

In Michaelmas Term, *M. C. Cameron*, Q. C., shewed cause, citing *Bunnel v. Whitlaw*, 14 U. C. 241; *Hodges v. Cobb*, L. R. 2 Q. B. 652.

Harrison, contra, cited *Doe McDonell v. Rattray*, 7 U. C. 321; *Doe Hill v. Gander*, 1 U. C. 3; *Young v. Elliott*, 25 U. C. 330, 334; *Hunter v. Farr*, 23 U. C. 324; *Greaves v. Hilliard*, 15 C. P. 325.

HAGARTY, C. J.—First, as to the commission. It was to examine Shaw, who lived in Detroit, and was addressed to Messrs. McDonell & O'Connor, both practitioners of this Court, living at Windsor. Either of them could act. The commission directs that, before acting, "You, or either of you, shall duly take the oath or affirmation, according to the form secondly endorsed hereon; and we give to each of you full power and authority to administer such oath or affirmation to the other."

Mr. McDonell acted alone.

It was admitted that there was a discussion between the counsel acting for plaintiff and defendant as to how this oath should be taken (Mr. O'Connor being probably absent, but this did not appear); that plaintiff's counsel said his opponent might do as he pleased, on his own responsibility, the other not consenting; and that after this oath was taken before Mr. White, a commissioner in Windsor, that plaintiff's counsel, aware of such fact, attended and took part in Shaw's examination without further objection.

I think we ought, if possible, under such circumstances, uphold the commission against this objection. The commission directs that the commissioners shall first be sworn. It then gives power to each to swear the other. The object of this power is very plain, as the commission is commonly executed abroad. It is not an express direction that the oath must be so taken. Had the commission been silent as to the manner of taking, it might, I think, be fairly assumed that such an oath, in a matter in the cause, might very properly be taken before any officer of this Court ordinarily empowered to administer oaths in a cause pending.

The object is to ensure the commissioner being sworn. He is, in the case before us, sworn before the ordinary officer for all oaths in the cause. It seems to me that the mere fact of a power granted in the commission, for the manifest purpose of increasing the facilities for administering the oath, should not be held as prescribing the only manner in which it can be taken, or destroying the validity of an oath taken before the officer generally empowered to administer all oaths in the cause.—*Boelen v. Melladew* (10 C. B. 898) and *Clay v. Stevenson* (3 A. & E. 807) may be referred to, as to the Court's view of the commissioner's oaths.

Had I been of a different opinion, I should have required further consideration before holding that plaintiff, after the course taken by his counsel at the examination, could now successfully urge the objection.

I think the commission was admissible.

The other objections taken in the rule were as to insufficiency of the alleged twenty years' possession, and as to Wires's possession of part carrying with it the possession of the whole, and the direction given to the jury thereon.

It is very difficult to lay down any inflexible rule as to the nature of a possession for twenty years sufficient to defeat the title of the true owner. I have examined the cases cited in the argument, with some others..

Where a person enters on part of a wild lot, claiming no title and not affecting to exercise ownership over any specific portion of it, building a house and clearing a portion, which he afterwards increases, I see little difficulty in rigidly restricting his title by twenty years possession to the part actually occupied for such a period.

In *Doe McDonnell v. Rattray* (7 U. C. 321) a man had settled on the west-half of a lot, either under a deed therefor from his brother, the owner, which was lost, or by his permission to occupy that half. He cut timber at various times on the east-half, and part of his clearing ran a little on to it, and he paid taxes for the whole. The late Sir J. Robinson says, in giving judgment: "If John (the occupant) had not plaintiff's (the true owner's) permission to occupy the whole lot, but had claim only to the west-half, we cannot extend his possession by construction over the east-half, on which he was not living twenty years ago, merely because he had committed occasional acts of trespass in cutting timber. It must be an actual occupation to the exclusion of the true owner, which enables the statute to operate in bar of the true title, and such bar will only apply to the part of the property occupied. The paying taxes signifies nothing. If he was residing on part of a lot under a title, valid or otherwise, to the whole, so that we could clearly see he was claiming the whole, the case would be different; but if, having permission only given him to occupy the west-half, he did confine himself to that half, so far as residence and cultivation went, and only committed depredations, as a stranger might do, on the

other half, we cannot hold him to have exclusive possession of both halves."

In this case the Court evidently laid much stress on the fact of his only clearing the west-half, and being a mere trespasser as to the east.

In *Hunter v. Farr* (23 U. C. 327) Draper, C. J., says: "If, without title, he enters on a lot of land in a state of nature, clearing and fencing a few acres only, leaving the rest open and unimproved, the actual possession of the part will not alone, in my opinion, draw to it the possession of the other part. I do not say what may be the effect of continuous acts of ownership over the residue, though uninclosed or uncleared, but here there was no such evidence to rest upon."

In the much contested case of *Young v. Elliott* (25 U. C. 333) the same learned Judge told the jury, "that a series of independent acts of trespass, each of them unconnected with the preceding or subsequent acts of trespass, would not in law amount to a possession; that the owner, by virtue of his title, was in possession in the eye of the law, though the land was in fact unoccupied; and that a wrong doer who entered upon the land must shew dispossession of the true owner by visible and continuous possession for twenty years in himself and in those under whom he claims; that such possession must extend over the whole of the land defended for, because such possession of a portion of a large lot could not by construction of law be deemed possession of the whole lot; that possession was a matter of fact for their consideration;" * * "nor can it alter the character of successive acts of trespass that they were all committed under the assumption of the same title."

There are some remarks favouring this view, in *Attorney General v. Chambers* (33 L. T. 189), by Chelmsford, C., to the effect that, when property is of a nature that cannot easily be protected against intrusions, that mere acts of user by trespassers would not establish a right. That was the case of a piece of open unenclosed marsh on the sea shore, to which a possessory right was sought to be

established by a user of it by defendant's cattle, which were turned out to graze thereon.

We are not now called upon to determine whether a succession of unconnected acts of trespass on open woodland can establish a twenty years possession. The proposition here is, whether a possession of part by a caretaker, expressly employed to protect the whole, on behalf of one claiming such whole by a paper title (afterwards shewn to be defective) and who does accordingly protect it from all other intruders, can or cannot establish a statutory possession. The jury were here told that there might be such a possession so established, and it was left to them, "that if a person claiming title to a lot, send a caretaker to live on it and specially to protect the whole from trespassers, and that he do so accordingly, that such may be a good legal possession of all so held and protected." The Judge was pressed by plaintiff's counsel to direct that there could not be such possession except as to the part enclosed or occupied. We do not think he could have accepted plaintiff's view.

In *Stoneburner v. Mattice*, tried at Cornwall, October, 1867, before the same Judge, the evidence was, that a person, claiming under a defective tax title to the whole of a wild lot, lived close to it and constantly watched it and guarded it from trespassers, using it himself when required for cutting timber, &c. The same objection was urged and the same direction in substance given to the jury, the Judge declining to rule that nothing but actual enclosing and fencing would suffice. On motion for new trial this ruling was upheld by the Court of Queen's Bench, but a new trial was ordered on the evidence generally.

We are not prepared to hold that unenclosed wood land in this country can never be the subject of a twenty years possession. If fencing and cultivation can alone constitute a possession, then title to open wood land can never be acquired against the true owner. To put an extreme case ; if a man posted caretakers or sentries every day to patrol the bounds of an unfenced lot, rigidly driving off all trespassers and thus preserving the whole for the exclusive use of their

employer, could it still be said that twenty years of such proceedings would not bar the true owner? If this can confer a possessory title, then the question becomes one only of degree.

We are not asked in this case to weigh the evidence. The objections to the verdict are based solely on the legal effect of the evidence offered; so, unless we hold that the Judge should have, as a matter of law, ruled with the plaintiff against defendant's evidence on this head, the verdict will stand; and no objection was taken to the direction as to the general nature of the possession required to bar the true owner. No question was raised at the trial except as to the nature and effect of Wire's occupancy and what he did as care taker for Shaw, the person thus claiming title; nor was any point made as to Wire having first occupied a part of the lot not now claimed by plaintiff, as is suggested in the rule. This would probably not have been of much importance, as the defence rested on Wire's alleged occupancy of part and actual protection of all, in the assertion and maintenance of his principal's claim to all.

On the objection, as presented at the trial and by the rule, we think we should not interfere, as we feel that we cannot accept the law in the broad manner in which the plaintiff presents it to us, nor hold there was misdirection in the charge to the jury. Unless, as before stated, we think that the Judge should have held there was no legal evidence under the Statute of Limitations, and that he was legally wrong in his direction, we should not interfere.

GWYNNE, J., concurred.

J. WILSON, J., took no part in the judgment, not having been present during the argument.

Per curiam—*Rule discharged.*

FELLOWES v. OTTAWA GAS CO.

Bond payable at particular place and on surrender—Right to recover without averring presentment there, and tender of surrender—Variance between declaration and bond.

The bond produced acknowledged defendants to be "indebted to the holder hereof in the sum of £ * * and do hereby promise to pay the same to such holder *at the agency of the Bank of Montreal at Ottawa, on &c., on the surrender of this bond*, with interest at the rate of, &c., payable, &c., *upon presentation of the several warrants or coupons hereunto annexed at the agency of the Bank of Montreal in the City of Ottawa aforesaid.*" The declaration stated that defendants by their bond, sealed, &c., became bond to the holder thereof in the sum of, &c., with interest, &c., to be paid to such holder thereof on, &c., and that plaintiff became holder thereof, yet said sum, with interest had not been paid.

It was admitted at the trial that the bonds were not presented at the place where they were made payable, and it was proved that, if they had been so presented, defendants had not funds there to meet them :

Held, that there was no variance between the bonds declared on and those produced, in the former being stated to be payable to holders generally, while the latter were payable only on surrender and at a particular place :

Held, also, that it was not necessary for plaintiff, as a condition precedent to his recovery, to aver and prove presentment at the particular place and a tender of the surrender of the bonds, or a readiness to surrender them.

The defendants were a company, incorporated under the Joint Stock Companies Act (22 Vic. ch. 65, Consolidated Statutes of Canada). By that Act the company were empowered to borrow money not exceeding \$40,000 at such rate of interest as the president and directors deemed necessary, and for that purpose to grant their bonds or debentures in sums of not less than \$200 each, payable to bearer, or transferable by endorsement or otherwise, as the directors saw fit ; and the president or manager of the company was authorized to draw, sign, or accept such promissory notes or bills of exchange, for the purposes of the company, without seal, as in the opinion of the directors might be necessary or expedient. In virtue of the authority so vested in them the company borrowed money upon the security of their bonds or debentures duly granted under their common seal, the material contents of the bonds so issued being as follows :

" Be it known that the Bytown Consumers Gas Company hereby acknowledge themselves to be indebted to the holder hereof in the sum of £ of lawful money of Canada, and do hereby promise to pay the same to such holder thereof, at the agency of the Bank of Montreal, in the City of Ottawa, on the first day of January, which will be in A. D. 1866, (on the surrender of this bond) with interest at the rate of seven per cent. per annum, payable half-yearly on the first days of January and July in each and every year, upon presentation of the several warrants or coupons hereunto annexed, at the agency of the Bank of Montreal, in the City of Ottawa, aforesaid."

Four of these bonds for £250 each, bearing date the 7th day of November, A. D. 1855, and one for £500, bearing date the 1st day of January, A. D. 1856, were granted to the plaintiff in security for moneys advanced by him to the company.

The principal sums secured by these bonds, with interest thereon since the 1st day of January, 1866, being unpaid, the plaintiff, on the 21st day of February, 1868, commenced this action, his declaration containing a count upon each of the bonds as follows: " For that the defendants, under their then corporate name, the Bytown Consumers Gas Company, by their bond, sealed with their common seal, and bearing date the seventh day of November, A. D. 1855, became bound to the holder thereof in the sum of £250 of lawful money of Canada, with interest at the rate of seven per cent. per annum, to be paid to such holder thereof on the first day of January, 1866, and the plaintiff became the holder of the said bond ; yet the said sum, with interest thereon, at the rate aforesaid, from the first day of January, A. D. 1866, or any part thereof, has not been paid."

The count on the bond for £500 corresponded with its amount and date of issue.

The defendants pleaded to each of the counts *non est factum*, and, secondly, that the plaintiff did not become, nor was at the commencement of the action, the holder of the bonds or of any of them.

Issue was joined on these pleas and the case went down for trial before Morrison, J., at the spring assizes, 1868, at Ottawa.

At the trial it appeared that the bonds were issued to the plaintiff for moneys loaned by him, and that he had always been and still was the holder of them. It was admitted that the bonds were not presented at the Bank of Montreal, when payable, and it was proved that the defendants had not then funds there to meet them, if presented.

At the close of the case the defendants counsel moved for a nonsuit, upon the ground of an alleged variance between the bonds declared on and the bonds produced, in that the declaration was on bonds payable to holder generally, and that those produced were payable only on surrender and at a particular place, and that there was no evidence of a tender to surrender the bonds at the time or place conditioned in the bonds, or since before action brought. A verdict was rendered for the plaintiff for \$6,937.80, and the learned Judge reserved leave to move to enter a non-suit.

In Easter Term last a rule was obtained accordingly; and further, to shew cause why the judgment should not be arrested for the want of an averment and proof of presentment of the bonds; or why the verdict should not be set aside for excessive damages, interest having been allowed.

McBride now shewed cause:—There is no variance between the bond produced and the declaration. The plaintiff need only shew the debt and nothing more, the proof of the discharge of the debt being cast upon the defendant: *B. & L. Prec. 70: Ashbee v. Pidwell*, 1 M. & W. 564. Then as to the interest, plaintiff is entitled to interest on the verdict: *Chitty Cont.* 8 ed. 597; *Farquhar v. Morris*, 7 T. R. 124; *Hogan v. Page*, 1 B. & P. 337.

A. N. Richards, Q. C., contra:—No doubt this is a qualified contract, and plaintiff must set out the instrument according to its legal effect. Where a note is in the body

made payable at a particular place, presentment there, or some sufficient excuse for failure, must be averred: *Chitty Bills*, last ed. 374; *Byles*, 9 ed. 208; *Sanders v. Howard* 14 Ea. 500. *Hinton v. Duff*, 11 C. B. N. S. 724, shews that, in an allegation that one J. H. T. by his bill of exchange, now overdue, the latter words are a material part of the description of the bill, and defendant can take advantage of it under a plea of *non accepit*. If a bill is payable at a particular place, this, as against the drawer, is part of the contract, and it is a variance to state it without that qualification: *Byles* 310; *Ros. N. P.* 11 ed. 174. When the acts are to be done at the same time, neither can maintain an action without shewing performance or offer to perform: *Chitty Pl.* 7 ed. 337; *Chitty Cont.* 8 ed. 668; 1 *Wms. Saunders* 320; *Morton v. Lamb*, 7 T. R. 125. Then, as to the mode of taking advantage of this under the plea, see 1 *M. & G.*, 757. When defendant's performance has to depend on some act to be done by plaintiff, the latter must aver performance of this: 1 *Chitty Pl.* 329. *Non est factum* puts in issue the non-execution of the document set out: *North v. Wakefield* 13 Q. B. 536. In case of a condition precedent plaintiff must aver and prove performance or an offer: *Chitty Cont.* 8 ed. 667; *Trott v. Smith*, 10 M. W. 453. The way to take advantage of a variance between the alleged and the real effect of a deed is by a plea of *non est factum*: *Smith v. Scott*, 6 C. B. N. S. 779, per Williams, J. Where a place is limited for payment, the party liable is not bound to pay at any other place, nor is the other bound to accept payment elsewhere: *Com. Dig.* 110, "Condition" G. 9; *Bac. Abr.* II. 153, "Condition" P. 4. In all actions on bonds of this kind here the document is set out as payable at a particular place: *Geddes v. T. S. R., Co.* 14 C. P. 513; *Mass. Hos. Co. v. Prov. Ins. Co.* 25 U. C. 63. "Every possible condition, upon which money is to become payable, must be performed, or dispensed with upon sufficient ground, before the money is demandable in an action; and in the action it must appear that the condition has been performed:" per Chief Justice, in *French v. Campbell*, 2 H. Bl. 178.

GWYNNE. J.—There is no doubt that under the issue raised by the plea of *non est factum* the plaintiff must prove that the defendants executed bonds agreeing with the bonds stated in the declaration, and the defendants may rely upon any *material* variance; but I cannot see that the declaration is at all open to the objection made. Mr. Richards' contention was that the bonds produced, being, as he construes them, subject to a condition for payment only upon presentment at the particular place designated in the bonds, and upon surrender, vary materially from the bonds declared upon; but if this be so, if these are bonds in a penalty subject to a condition, then the several counts in the declaration set out the penal portions of the bond, which is the ordinary mode of declaring, and the production, in such case, of a bond with a condition, constitutes no variance. If it did, then there never could be a declaration setting out the penal portion of the bond, and the statute of 8 & 9 Wm. III., requiring (in certain events, and among those, the event of *non est factum* being pleaded to such declaration) the assignment or suggestion of breaches, would be unnecessary. The objection, if good, is not one of variance, but that, in the absence of a suggestion of breaches, if such a suggestion be necessary, the plaintiff should not have execution. In *Hardman, Executor of Agnes Hardman, v. John Hardman* (Cro. Eliz. 886) debt was brought upon a bill obligatory, for that the defendant acknowledged himself to owe and promised to pay to the said Agnes £10 at any time after the feast of Bartholomew, which should be in the year 1600, "whenever the said Agnes should require it, if the said Agnes should be then alive; that the defendant, *licet sæpius requisitus* by the said Agnes after the said feast, to wit, such a day, had not paid it. The defendant demanded oyer, which was, "Memorandum, that I, John Hardman, the younger, do acknowledge myself to owe and do promise to pay to my mother, Agnes Hardman, the sum of £10 at any time after the feast of St. Bartholomew, whensoever she shall require the same, if my said mother shall then be in life; for the payment whereof I bind myself

my heirs, &c., &c., to John Hardman, the elder, my father, by these presents, sealed, &c." The defendant therefore demurred for variance; but it was adjudged for the plaintiff, and that it was a good bond or single bill by the word in the first part of the bill, and that the words "for payment whereof I bind myself, &c., &c.," might be rejected as void.

So, in *White v. Hancock* (2 C. B. 830), where A. declared upon a bond by C. in a penal sum payable to A., and the bond, being set out on oyer, appeared to be a bond by C. in a penal sum payable to A. or B., subject to a certain condition, and the defendant demurred for the variance, B. not having been named, yet the Court held the declaration good. Now, these were stronger cases than the present, for the variances there complained of were between the penal part of the bonds declared upon and the penal part of those set out on oyer; but here what is complained of is, that the bond produced, having a condition, as is said, annexed to it, *must* be different from the bonds mentioned in the declaration, which, if these be penal bonds with conditions annexed, set out the penal part only.

Then, it was contended that it was necessary for the plaintiff, as a condition precedent to his recovery, to aver and prove presentment at the particular place named in the bond for payment, and a tender of the surrender of the bonds, or a readiness to surrender them; and the case was likened to that of promissory notes made payable at a particular place, and several English authorities were cited upon this point. If by this it was meant that, by reason of the language of the instruments, they were in fact promissory notes, then the English authorities have no application; for, although the English Act 1 and 2, Geo. IV. ch. 78, does not extend to promissory notes, our Act 22 Vic. ch. 42, sec. 5 (Consolidated Statutes of Upper Canada) does, and so these instruments, if notes, are not payable at a particular place; and if it was meant that, although being bonds, the same necessity for presentment exists as did formerly exist in the case of promissory notes before the statute, the answer is, that the same principles never did

apply to bonds as to promissory notes, presentment, as a condition precedent in the case of notes, having been an incident applicable to them, as the creatures of the law merchant, and being confined in its application to promissory notes and bills of exchange. I was referred to *Com. Dig.* "Condition" G. 9, and *Bacon's Abr.* "Condition," P. 4, for authority that, if a place certain be limited for payment of a bond, the obligor is not bound to pay at another place, neither need the obligee accept it at another place. The like law is stated in 1 *Rolle. Abr.* Condition, p. 444, l. 7, and p. 445 l. 52; but the meaning of this is not, that the obligee must in his declaration aver presentment or a readiness to surrender the bond; but, as is shewn in a subsequent paragraph in the same page in *Bac. Abr.*, that the obligor is not bound to go over the world to look for the obligee, and by readiness to pay at the place and time named will discharge himself from *all damages* if the other is not there ready to receive, but not from the *debt*. There it is said, "If by the condition of an obligation money is to be paid to the obligee at *or before* the 29th day of September, at a particular place, it *cannot* be tendered *at the place* before the day, unless the obligee is there ready to receive it; but if the obligor meet the obligee at any place before the day, he may there tender it and the obligee ought to receive it." The distinction between bonds, whether with or without condition, and promissory notes, in this respect, is fully explained in *Rowe v. Young* (2 B. & B.), in the opinions of the Judges set out at p. 180 and the following pages, and in fact it was the well acknowledged doctrine in relation to bonds and to debt for rent, which is payable on the land, without any averment of presentment or readiness to receive, which was the foundation for the judgment of the Court of Queen's Bench, that, in the case of a bill drawn generally, but accepted payable at a particular place, presentment was not necessary to be averred and proved; and although the Court of Common Pleas came to a different conclusion, they did so basing their judgment on the custom of merchants, not

questioning the rule as to bonds; and in *Rowe v. Young*, supra, at p. 192, are cited several instances of actions on bonds payable at particular places taken from *Rastall's Entries*, wherein it was never questioned that the defendant must discharge himself by plea of performance, without any averment of presentment in the declaration.

The principle is, that the *obligation* creates a debt from the date of the bond, and whether the bond be with or without a condition the obligor must discharge himself by plea. If he has made the obligation payable at a particular place and time he may, by averment of his being there ready to pay, but that the obligee was not there ready to receive, and that the obligor has always since been ready, with a *profert in curiam*, discharge himself from the damages: *Rowe v. Young*, supra p. 193; but the obligee may, in reply, deny that the obligor has always since been ready, and, by proving a demand after the day and non-payment, may entitle himself to the damages, while the debt itself is never discharged without actual payment or *profert in curiam*. The only objection, then, it is apparent, which the defendant could make to the plaintiff's action, would be an objection to his having execution without a suggestion of breaches, if the case is within the statute of Wm. III.; but that it is not is clear upon authority. A bond for the payment of a sum certain on a given day, and of interest in the mean time on specified days, anterior to the day fixed for the payment of the principal, is not within the statute: 1 Saund 58 a, note b; *Murray v. Earl of Stair* (2 B. & C. 82); *Cordozo v. Hardy* (2 Moore 220). If it should be put in suit for recovery of interest before the day for payment of the principal, the defendant may plead payment of the interest *post diem* under the Statute of Anne: *Hodgkinson v. Wyatt* (1 Dowl. & L. 668). The bonds, then, here declared on are single bills or bonds obligatory and not within the Statute of William, and the defendant not having discharged himself by plea, the plaintiff, on *non est factum*, having proved the execution of the bonds, is entitled to recover his debt acknowledged by

them, and his interest accrued since the day of payment, as damages. It would be a grave reproach, indeed, to the law if it were not so, and if the defendants, who by the evidence are shewn never to have been ready to pay, could have prevailed in further damnifying the plaintiff by defeating his action.

Rule discharged.

BANK OF BRITISH NORTH AMERICA v. CLARKSON,
ASSIGNEE OF MILLER.

Warehouse receipts—Con. Stats. C. ch. 54, secs. 8, 9—24 Vic. ch. 23, sec. 1.

M. & Co. being indebted to the plaintiffs on certain overdue notes, it was agreed that plaintiffs should discount a further note for them, with the proceeds of which, it was understood, the overdue paper should be retired; that M. & Co. should hand over to plaintiffs certain warehouse receipts for wool, stored in their warehouse, as collateral security. This note was accordingly, on 23rd January, 1868, discounted by plaintiffs, and the old notes duly retired, an agreement being signed by M. & Co. at the time of the discount, reciting that they had indorsed over the receipts as collateral security for the note, &c., &c. The receipts, nearly all in the same form, were as follows:

“WAREHOUSE RECEIPT.

“Received in store in our warehouse, at * * * from sundry parties, 17,900 pounds batting, to be delivered pursuant to the order of the Bank of British North America, to be indorsed hereon. The said batting is separate from, &c., &c.” Neither M. & Co. nor the Bank endorsed the receipts:

Held, that they were not warehouse receipts under the statutes referred to, and that the Bank could not, therefore, claim the property covered by them.

Per *Hagarty*, C. J., that the transaction of the 23rd January was not in substance, though in form, a present advance to M. & Co., but merely a mode adopted of paying off an already existing debt.

Declaration in trover for a quantity of wool.

Pleas, not guilty and denial of plaintiff's property.

At the trial at Toronto, before *Morrison*, J., Mr. Taylor, the Bank Manager, proved that the firm of John Miller & Sons had been customers of the Bank for over a year. On the 2nd September, 1867, a note of theirs, held by plaintiffs, for \$1000, was overdue, and on September 7, there was also an overdue note for \$4000. No collateral

security was held for these notes. Witness required payment from the Millers. They had a wool warehouse, in which they said they had a quantity of wool, and it was not advantageous to sell then, and they asked the Bank to discount on the wool as collateral. On the 23rd January, 1868, the witness accordingly discounted a note of James Miller to John Miller & Son (the parties to the September overdue notes) for \$5,191.10, dated 18th January, 1868, payable in two months. Six warehouse receipts for wool were given to the Bank by Miller & Son, as collateral. The proceeds of the discount were placed to the Miller's credit, and they gave a cheque for the amount of the overdue September notes (\$5,133.21). It was understood these notes were to be retired, and the discount would not have been made except on that understanding. A printed form of agreement was signed by the Millers at the time of the discount, being the usual agreement taken by this Bank in such cases. It was dated 23rd January, 1868, and stated that the Millers had endorsed over the annexed six warehouse receipts (giving their dates) as collateral security for their note, describing it, with power to sell the goods at any time; that the property should be at the Millers' risk; that they would insure, or that Bank might on their default; and that the Bank might place the property in charge of any respectable broker or warehouseman without prejudice to their claims on the note. Apart from that discount they had \$1.27 to their credit when they gave the cheque: the overdue bills had not been charged to them. After January the witness discounted for them at different times \$2,393.

A clerk of the insolvents proved that the wool mentioned in the receipts was in Miller's warehouse when given to Bank, and this wool afterwards came into the defendant's (the assignee's) hands; that they were much pushed by creditors in January, 1868, but he did not think they were insolvent. It was sworn that on the 19th May, 1868, there was wool in the store, to the value of \$2,400.31.

A statement of wool, to the value of \$4,082.73, headed "Stock on hand, October 26, 1867," was put in by plaintiffs

with a memorandum endorsed, dated February 13, 1868, signed by J. Miller & Sons, authorizing the Bank manager to dispose of that stock at the prices named, with an exception.

The failure was said to be in May, 1868. A demand and refusal were proved.

On the part of the defence it was objected that the warehouse receipts were not valid under the statutes, as they were to the order of the plaintiffs, not endorsed. 2nd. That they were taken for a precedent debt and so not within the statute. 3rd. That the transaction was void under the Insolvent Acts.

Leave was reserved to enter a non-suit on these objections.

It was sworn that in September the Millers were pressed for, and borrowed money they could not pay, and on June 4th they gave a warehouse receipt for 10,000 pounds wool, which the holder never could get; that they had a meeting of creditors in December, to shew a statement of their liabilities, and a creditor then told them that they could not pay fifty cents in the dollar, and they seemed to have tried to make some arrangement; that their liabilities were large—from \$75,000 to \$100,000—and that it was well known the state they were in; that they gave cheques in November which were refused payment, and at the end of same month the holder of one cheque offered to take half for it.

In reply Mr. Taylor was recalled. He said that when he took the receipts he did not know and never heard they were insolvent, and had no idea they would not pay their debts; he had often enquired; he had heard of cheques being presented and refused, but it was not unusual to give cheques not to be presented at once.

The jury were told to find if Miller & Son were insolvent or not on 23rd January; if insolvent, or on eve of insolvency, and known to plaintiffs, to find for defendants; if insolvent, but unknown to plaintiffs, and they discounted the bill and took the security in the usual course of business, to find for plaintiffs.

Each party objected to the charge.

The jury found that they were insolvent on the 23rd January, but that this was unknown to plaintiffs, who acted in good faith, &c., and they found for plaintiffs \$2,000.

In Michaelmas Term, *Harrison*. Q.C., obtained a rule to enter a nonsuit on the leave reserved; or for misdirection, as to plaintiff being protected by want of knowledge; and on the law, evidence, and weight of evidence.

Dr. *McMichael* shewed cause. He cited 24 Vic. ch. 23; 31 Vic. ch. 11; *Atkinson v. Brindall*, 2 B. N. C. 225; *Abbott v. Burbage*, Ib. 444; *Strachan v. Burton*, 11 Ex. 647, 650; *Morgan v. Brundritt*, 2 N. & M. 280; *Belcher v. Jones*, 2 M. & W. 258; *Green v. Bradfield*, 1 C. & K. 449; *Hale v. Allnutt*, 18 C. B. 505; *Gottwalls v. Mulholand*, 15 C. P. 62; *McMaster v. Clarke*, 7 Grant, 550.

R. A. Harrison, Q. C., contra, cited *Bills v. Smith*, 12 L. T. N. S. 22; C. S. U. C. ch. 26, sec. 18⁵; *Ramsbottom v. Lewis*, 1 Camp. 279; *Holroyd v. Whitehead*, 3 Camp. 530; *Bank of Toronto v. McDougall*, 15 C. P. 475; Insolvent Act; of 1864, sec. 4, s-sec. 8; *Pennell v. Heading*, 2 F. & F. 744; *Graham v. Candy*, 3 F. & F. 206; *Cook v. Pritchard*, 5 M. & G. 329; *Marshall v. Lamb*, 5 Q. B. 115; *Lovden v. Sharpe*, 6 M. & G. 895; *Graham v. Larke*, 12 C. B. 84.

HAGARTY, C. J.—The plaintiffs claim to maintain this action for the wool, &c., mentioned in the six receipts, and assert property therein, as against Miller's assignee, the defendant. The plaintiffs never actually had the wool in their possession, and it came into defendant's hands in Miller's warehouse.

Three of these receipts are dated Nov. 22, 1867; one Dec. 31, 1867, and two dated 10th January, 1867 (by error, as was sworn, for 1868.)

They are nearly all in the same form :

“ WAREHOUSE RECEIPT.

Received in store in our warehouse, at 85 Front Street, Toronto, from sundry parties, 17,900 pounds batting, to be

delivered pursuant to the order of the Bank of British North America, to be endorsed hereon.

"This is to be regarded as a receipt under the provisions of Stat. 22 Vic. ch. 20, being ch. 54 of the Consolidated Statutes of Canada, and the amended Statute 24 Vic. ch. 23. The said batting is separate from, and will be kept separate and distinguishable from other batting.

"JOHN MILLER & SON."

"Dated Toronto, Nov. 22, 1867."

Then follows an extract from 92 Con. Stat. Canada, sec. 68, as to the punishment on warehousemen giving false receipts.

A second receipt of same date follows this form; but the next, instead of received "from sundry persons," says "received from factory," and the remaining three make no mention of the stuff being received from any person or place.

There is no endorsement whatever on any of the receipts, except a memorandum on two of them, of the particular quantities of wool, &c.

The agreement already noticed, of 23rd January, says that the Millers have endorsed over the annexed six warehouse receipts to the Bank, as collateral security, &c.:

Ch. 54, Con. Stat. Canada, sec. 8, declares that any receipt given by a warehouseman for goods, &c., stored or deposited &c., in any warehouse, &c., &c., may, by endorsement thereon by the owner of, or person entitled to receive such goods, &c., or his attorney or agent, be transferred to any incorporated or chartered Bank, or to any person for for such Bank, or to any private person or persons, as collateral security for the due payment of any bill, &c., or note, discounted by such Bank in the regular course of its banking business, or any debt due to such private person, &c.; and being so endorsed shall vest in such Bank or private person, from the date of such endorsement, all the right and title of the endorser to or in such goods, &c., subject to the right of the endorser to have the same re-transferred to him, if such bill or note be paid

when due ; and in the event of non-payment of such bill, note or debt, when due, &c., may sell, &c., and retain the proceeds, or so much as will be equal to the amount due, &c., returning the surplus, if any, to such endorser."

Sec. 9, declares that no goods shall be held in pledge over six months ; "and no transfer of any such bill of lading, &c., or receipts shall be made, &c., to secure the payment of any bill, note, &c., unless such bill, &c., be negotiated, &c., at the same time with the endorsement of such bill of lading, &c., or receipt."

Stat. 24, Vic. ch. 23 (1861) sec. 1, amends the preceding Act in the 8th sec., by adding that when any warehouseman, &c., by whom a receipt may be given, in such, his capacity, for goods, &c., is at the same time the owner of, or entitled himself, (otherwise, &c., than as warehouseman, &c.,) to receive such goods, &c., any such receipt or any acknowledgment or certificate intended to answer the purpose of such receipt, given and endorsed by such person, shall be as valid and effectual for the purposes of this Act as if the person giving such receipt, acknowledgment or certificate, and endorsing the same, were not one and the same person ; and the wilfully making any false statement, &c., &c., or not delivering to the holder or endorsee any cereal grains, goods, &c., mentioned in such receipt, certificate or acknowledgment, contrary to the undertaking therein expressed or implied, shall be a misdemeanour, &c.

Sec. 2 enacts that all advances made on the security of any bill of lading, specification, receipt, acknowledgment, or certificate, shall give, &c., to any Bank, &c., making such advances, a claim for the repayment of such advances on the grain, goods, &c., therein mentioned, in preference, &c., to the claim of any unpaid vendor.

The first objection is, that these receipts are not in compliance with the statutes.

It may, I think, be fairly assumed that the Legislature at first contemplated the case of parties storing goods in a general warehouse, and taking the receipt of its keeper therefor, and that a certain commercial value should be

impressed on these receipts, enabling the holders to obtain credit and raise money upon them, a matter naturally of vast importance in a community dealing largely in agricultural productions. Such receipts might be readily transferred to secure the repayment of advances made, the security being enhanced by the statutable declaration that the endorsement by the owner of the goods should vest in the person making the advance all the endorser's title to the goods.

Prior to this statute warehouse receipts were in use, but, as said by Macaulay, C. J., in *Deady v. Goodenough*, (5 C. P. 176), "the delivery of such instruments was not a constructive delivery of possession of the flour itself * * they do not pass the property in goods like bills of lading, at all events until presented and acted upon;" and see *Glass v. Whitney* (22 U. C. 294).

Our Banks could not make advances on such property, under their chartered powers till the Legislature intervened, and since such intervention a very large portion of the business of the country is transacted by means of advances on these receipts.

To afford further facilities it was next provided that the warehouseman, if he own the property in his own right, may give a receipt or certificate for goods in store, and the receipt given and endorsed by him shall be as valid as if the giver and endorser were not one and the same person.

This latter power has been largely exercised, and we fear as largely abused. It was held in this Court, in *Todd v. Liverpool, &c., Co.* (18 C. P. 20), that the clerk of the warehouseman might give a valid receipt in favour of his master, the warehouseman, and the latter could transfer them by endorsement.

The receipts before us here do not profess to be ordinary receipts from parties storing goods, and whose property the goods are declared to be, as it seems to me must have been the course originally contemplated by the Legislature, *i. e.*, a receipt or acknowledgment that A. B. had specified goods

in the store, which he could deal with by transfer of the receipt. This course could be equally well followed, if the receipt were by the warehouseman to himself, as owner.

Here a very different course is taken. Two of them speak of the goods as received from sundry parties; a third as received "from factory;" the remaining three say nothing as to any person from whom the goods were received. They all declare that the goods are "to be delivered pursuant to the order of the Bank, B. N. A., to be endorsed hereon."

The substance of all the receipts may be fairly stated as a certificate or acknowledgment by Miller & Son, the warehousemen, that certain goods are in their warehouse, subject to plaintiffs' order.

Primâ facie, I would gather from such documents that the plaintiffs, the true owners of these goods, could transfer them by endorsement to any persons in security for an advance or debt. They are certainly not receipts (as I read them) given by the warehousemen in their own favor, transferable by them in security for advances. I do not see how we can regard them in support of plaintiffs' case, except in one of two lights; 1st. As receipts given by the warehousemen in their own favour, of their own property, and which they can transfer to plaintiffs as security; or, 2ndly. As a receipt, acknowledgment or certificate, intended to answer the purpose of a receipt (in the words of the Act) that the goods are in their warehouse belonging to the Bank, or subject to the Bank's order, to be endorsed thereon. Taking the latter view first, it would be, then, in substance, an assignment or conveyance of this property to the Bank; and looking at the contemporaneous memorandums given in evidence, it would be in fact a mortgage, defeasible on due payment of the discounted note.

It seemed agreed on the argument that it was only under the powers of the statutes cited, that the Bank could hold such property or make advances on the security thereof. As an ordinary mortgage it would be open to other objections also under the Chattel Mortgage Act, as there was

no change of possession, &c., though no execution creditor here intervenes to raise the question.

If these are on their face valid warehouse receipts under the statutes, they must be either receipts in the warehousemen's own favour, or we must hold that the receipts may be given directly to and in favour of the Bank or person making the advance.

It is not easy to see how this can be done under the first act, which provides that any receipt given by a warehouseman may, by endorsement thereon by the owner of or person entitled to receive such goods, &c., be transferred to any Bank, &c., as collateral security, and being so endorsed shall vest in such Bank, &c., from the date of such endorsement, all the right, &c., of the endorser to such goods.

I am unable to see how it is possible to comply with these plain directions, if the receipt be direct to or in favour of the Bank. There can then be no indorsement by the owner, nor can the property vest from the date of such indorsement. Neither the Bank nor Miller & Son have endorsed any of these receipts. We must wholly change the framework of the Act if we hold these receipts to clothe the Bank with all the rights of the owners of the goods.

Then, under the Amending Act, which is to be read as part of the first enactment, when the warehouseman and the owner are the same person, a receipt or acknowledgment, &c., "given and endorsed" by him, shall be as valid and effectual as if the person giving the receipt and endorsing the same were not one and the same person." What does this mean? Does it not still import that the receipt or acknowledgment must be to or in favour of the owner, who may indorse it over to the Bank or person making the advance? In my opinion this question must be answered in the affirmative.

I do not feel at liberty to substitute, for what seems to me the machinery provided by the statutes, a totally different process for carrying their intentions into effect. It is not for me to say that it will do just as well to have

the receipts made directly in favour of the Bank making the advance, and that there need not be a person already holding the receipt in his own favour, who, by endorsement, may transfer it to the Bank making the advance.

If the receipt can be given directly to the Bank, and no endorsement necessary by the owner, the property must vest from the time the receipt is delivered to them, and for the words "from the date of the endorsement" we must read "from the time of delivery."

Receipts such as those before us can be hardly said to be transferred at all: they are given direct. It is to be noted that, although not delivered to the Bank till 23rd January (the day of the discount), they are dated variously on previous dates, some of them two months back: yet, they all profess that the goods receipted are to be delivered to the order of the plaintiffs.

It will hardly be contended that the Bank had any property or interest in the goods by the mere execution of the receipts, assuming them to be made on the respective days of date. Then, if so, the property can only vest from the moment when, to secure the advance, the manual custody of the receipt was given to the Bank; in other words, when documents, rightly or wrongly, professing to shew that certain goods were in store months before, subject to the Bank's order and control, were first placed in the Bank's possession. This may be a good way of creating a mortgage in favor of the Bank on the goods, but, in my judgment, is not the way allowed by the statutes for dealing with them, by way of warehouse receipt.

By the contemporaneous memorandum the Millers say they have endorsed over these receipts to the Bank. This, in fact, was not done, although so declared, and even if done might be still open to question: on the face of the receipts the right of property would seem to follow the order of the Bank, not the order of the Millers.

The statute allows a sale of the property in the event of non-payment of the bill or note, &c. Here the parties, by a memorandum, dated February 13, some time before the

maturity of the discounted note, provide as follows: " We hereby authorize you to dispose of any of the within stock at the prices placed opposite each, with the exception of the flock, which is to be \$2 per lb.," &c. This was endorsed on a bill of prices headed, "Stock in hand, Oct. 26, 1867."

I am of opinion that the Bank cannot be considered as holders of warehouse receipts for this property under the statutes, and that the course pursued is subversive of the whole design of the Legislature in creating this machinery and attaching certain commercial value to dealings based upon its provisions.

In the view I take of this branch of the case, it is not necessary for me to discuss the remaining points.

I, however, state my opinion that the transaction of the 23rd January was not in substance, although in form, a present advance to the insolvents, but merely a form adopted to pay off an existing debt. The two September notes were long overdue without security. By the new arrangement a sum sufficient to pay them off with interest was to be made available by a new note by the same parties, to be discounted by the Bank, on the professed security of the wool receipts, and the proceeds applied, as they were applied immediately, to retire the old notes.

Mr. Taylor's evidence is clear as to the real nature of this transaction. He says, "It was understood these notes were to be retired, and the discount would not have been made except on that understanding."

I think it useless to describe this arrangement as anything except a furnishing of security to pay an existing debt due to the Bank, with an extension of time for two months during the currency of the new note.

On the finding of the jury the Millers were then insolvent, but that fact was unknown to the Bank, who acted in good faith.

If the case were again submitted to a jury, it is not improbable that their attention will be strongly called to the fact that at the time of this transaction these insolvents were known to the plaintiffs to be persons who gave

cheques on Banks on which payment was refused. It requires a large amount of commercial charity to look upon such a practice as consistent with unsuspected solvency.

GWYNNE, J.—The plaintiffs are not entitled to recover in this action unless the property, which is the subject of the action, is vested in them. That property has not, and could not be, vested in them, from anything which appeared in evidence and is admitted, otherwise than in virtue of the receipts produced at the trial.

Those receipts never had any efficacy to pass the property to the plaintiffs and vest it in them, unless they are documents within the provisions of, and executed and transferred in the manner and for the consideration required by 22 Vic. ch. 54, as amended by 24 Vic. ch. 23, and as now consolidated by 31 Vic. ch. 11. These plaintiffs, being an incorporated Bank, the receipts have no efficacy or validity whatever under these statutes, if the consideration upon which they were given was an antecedent debt.

I cannot see, therefore, as at present advised, that the case is embarrassed by any consideration of the fraudulent preference clause (sec. 18 of 22 Vic. ch. 26), nor of the Insolvent Act; for as nothing at all passed to the Bank, if the consideration was an antecedent debt, it is useless to enquire whether what has not passed at all has passed by way of fraudulent preference. So, if for a like reason nothing has passed, it is useless to enquire whether that which has not passed at all has passed in such a manner as to be avoided, or to be voidable, under any of the provisions of the Insolvent Act; while, on the contrary, if the consideration for the transfer of the receipts to the Bank was a present actual advance, made in the regular course of banking business, upon the faith of the security, I cannot at present see how a transaction so entered into within the meaning of the Act respecting Banks can very well be declared to be of a character which would make it *void* under any of the provisions of the Insolvent Act: *Bank of Australasia v. Harris*,

(6 L. T. N. S. 115.) Although this is my present impression I do not mean to express a conclusive opinion upon the subject, reserving to myself the right to do so when the question shall more pointedly arise: it is not, in my opinion, necessary to be determined in the present case, which I think can be disposed of upon a consideration solely of the provisions of the Act respecting Banks (31 Vic. ch. 11).

Irrespective of that Act the plaintiffs could acquire no interest in the property, which is the subject of this suit, in virtue of the receipts produced. The Legislature, then, having thought fit to enable Banks to acquire an interest in property under what are familiarly termed warehouse receipts, subject to certain conditions, and not otherwise, I cannot see that I have any right to relax those conditions, or to say that a mode of effecting the desired object, namely, the acquirement of an interest in the property, different from that directed by the Legislature, shall be equivalent to that which the Legislature has directed. It is no part of the duty of a Judge to ask himself whether the Legislature would have sanctioned the *modus operandi* adopted in this case: it is his business simply to decide, according to the best of his judgment, whether the language used, or a necessary implication from that language, warrants the conclusion that it has sanctioned it. The best construction of an Act of Parliament is that which is consistent with the plain and natural sense of the language in which the Act is expressed, without adding to or detracting from its force. If a construction so arrived at does not effect the intent of the Legislature, it, and it only, can provide a remedy. There would be no stability whatever in the law if one Judge should be at liberty to sanction one mode, and another Judge another, not expressed by the Legislature.

Now, by the language used, the Legislature has, to my mind, very plainly declared that there shall be a receipt, acknowledgment or certificate *signed by* the warehouseman and *given to* the owner, and that such receipt shall have the name of such owner *endorsed thereon*, either by the owner himself or his attorney or agent; and that when so *given*

and endorsed, if the person giving it and endorsing it, be one and the same person, the property represented by it may pass to and vest in the Bank, provided the advance be made on the bill or note at the same time with the endorsement. Now, do all these conditions concur in the receipts produced? The answer, in my opinion, must be that they do not, and that in fact none of them existed. None of the receipts name any owner; some of them convey that "sundry persons," which, I take it, must be other than the warehousemen, were the owners. The receipts do not indicate who are or is the persons or person competent to endorse them, and there is no endorsement made by any person on them. It cannot be collected from the instruments themselves whether they are intended to operate under the body of the clause, as distinct from the proviso, or under the proviso, and I have no difficulty in holding that these are matters which must appear upon the instruments, and cannot be left to be established and supplied by collateral evidence. The instruments do not appear to be endorsed at all, and the document produced, if it could be sufficient to establish an indorsement, does not profess to do so. That document *recites* that "the undersigned have endorsed over the annexed six warehouse receipts, (describing them by dates, but not having nor appearing ever to have had any receipts annexed), which receipts the document says "*are* endorsed by ourselves." The documents produced, not being so endorsed, the implication is that these are not the receipts referred to in the document. Moreover, it not appearing that John Miller & Son, who sign this document and the receipts, were the owners also, as well as warehousemen, their right to endorse does not appear. That also would have to be established by extraneous evidence; and if that could be permitted, and if the requirements of the statute are not to be collected from the instruments themselves, it might as well, as it appears to me, be laid aside altogether. Moreover, this document professes to give to the Bank a right to deal with the property in a manner not warranted by the statute, and if that

can be done, an easy road is opened to the evasion of the statute.

Then, as to the consideration. The evidence appears to me to establish beyond any question that these instruments were created, given and taken, as a security for an antecedent debt, in plain evasion of the statute, and a verdict arriving at a contrary conclusion could not be supported upon the evidence. As, however, the attention of the jury was not, as I think it should have been, called to this point, I confine my judgment to the former points, which appear to me plainly to require that a nonsuit should be entered pursuant to the leave reserved.

Wilson, J., concurred.

Rule absolute to enter nonsuit.

ROYAL CANADIAN BANK V. KELLY.

Mortgagor and mortgagee—Proviso for continuance in possession by mortgagor—Distress clause—Construction—27 & 28 Vic. ch. 31—Pleading.

A clause in a mortgage that the mortgagor shall continue in possession, coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in accordance with the terms of clause 15 of the 2nd schedule to 27 & 28 Vic. ch. 31, creates the relationship of landlord and tenant at a fixed rent.

Held, also, that by the indenture of mortgage set out below, the tenancy created was until the day of repayment of the principal, for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises; but, *held*, on demurrer, that the avowries set out below, justifying under such a distress clause contained in a mortgage, were bad, as not alleging that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy, in pursuance of such permission, at the time of the distress, or at any time.

Replevin for 70,000 feet of sawed pine lumber, and about 1,000 pine logs, then in, &c.; also about 250 tons of plaster, stone and plaster, at, &c.; also certain cattle and other property of the plaintiffs.

The defendants avowed, in substance, (1) that before the said time when, &c., one Dewey mortgaged to defendant Kelly certain lands, the said mortgage containing a proviso for making the same void on payment of the amount secured by a day named, and covenant for payment, and also covenant for distress, on default in payment, in accordance with the terms of clause 15 of schedule 2, 27 & 28 Vic. ch. 31, with an averment that there were due \$1,412.50 for interest, and that default had been made, and thereupon defendant Kelly distrained.

The second avowry was in all respects similar to the first, with the exception of an averment that the covenant for distress was a license to take any goods found on the premises, and that plaintiffs claimed the goods under the alleged conveyance thereto from said Dewey subsequently to said mortgage and the accrual of the interest thereunder; and that plaintiffs had at the time of said conveyance notice of said mortgage, its covenants, &c.

Demurrer:—1st. Said avowries confessed plaintiff's declaration, but did not sufficiently avoid it.

2nd. Alleged in declaration, and admitted by avowries, that goods claimed were property of plaintiffs, and covenant in mortgage from Dewey to defendant Kelly could not and did not give any right or title to defendants to distrain goods of third party on land; such covenant could only operate as license by mortgagor to distrain his own goods for arrears of interest, but could not give any right over, or justify taking goods of stranger.

3rd. Though alleged that default made by mortgagor in payment, yet not shewn that distress was made within six months after such default, or that Dewey was in possession of land at time of distress; and no tenancy existed, or alleged, or pretended to have existed, between Dewey and defendant Kelly at time of distress.

4th. Not shewn that terms of pretended power of distress, contained in covenant, followed or pursued, in this, not alleged that defendant Kelly ever issued warrant of distress, or other defendants acted under such warrant.

5th. Not alleged that interest or any part thereof in arrear or unpaid up to and at time of distress.

6th. Not sufficiently shewn said goods were in and upon said lands, or any of them, at time of seizure and taking thereof.

7th. Defendants improperly attempted to vary effect of, and put a construction on, covenant set out, contrary to law and to rules of pleading.

R. A. Harrison, Q.C., for the plaintiff, contended that the relationship of landlord and tenant must exist when the power of distress is exercised; that there was no tenancy created by the mortgage, except that which might arise under the proviso; that the relationship of landlord and tenant existing, the tenancy ceased to exist after default, and the right to distrain did not arise until after the default. He cited *Haacke v. Marr*, 8 C. P. 441; *Saffery v. Elgood*, 1 A. & E. 191; *Lambert v. Marsh*, 2 U. C. 39; *Wilkinson v. Hall*, 3 B. N. C. 508; *Doe Parsley v. Day*, 2 Q. B., 147, 153; *Chapman v. Beecham*, 3 Q. B. 723; *Pollitt v. Forrest*, 11 Q. B. 949, 961; *Taylor v. Needham*, 2 Taunt. 278.

J. D. Armour, Q.C., contra, cited 27 & 28 Vic., ch. 31; *Fisher Mortgages* 2 ed. 468; *Brown v. West Counties Society, &c.*, 1 E. & E. 832; *Freeman v. Edwards*, 2 Ex. 732; *West v. Fritche*, 3 Ex. 216; *Pinhorn v. Souster* 8 Ex. 763; *Doe Wilkinson v. Goodier*, 10 Q. B. 957; *Morton v. Wood*, L. R. 3 Q. R. 658.

GWYNNE, J. (a)—In *Wilkinson v. Hall*, (3 Bing., N. C. 508) plaintiffs had mortgaged land in fee, with a proviso for redemption upon payment of principal, with interest, in six months, namely, in June, 1833; but it was agreed in the mortgage that the mortgagee should not call in the principal until 1840, if interest were regularly paid in the meantime, and that the mortgagor should hold the premises and take

(a) The Chief Justice and Wilson, J., having been absent on official business during the argument, delivered no judgments.

the rents, issues and profits, for their own use till default should be made in payment of principal and interest, and it was held, upon the authority of a passage in Bacon's Abridgment, tit. "Leases," K., that this agreement operated as a redemise to the mortgagors until 1840, and that therefore they were entitled to recover for use and occupation against persons who held as tenants before the purchase of the premises by the mortgagors, and who after the purchase continued to occupy by the permission of the mortgagors.

In *Doe Garrod v. Olley* (12 Ad. & El. 481) a mortgage dated 11th January, 1836, contained an agreement that the mortgagor, his heirs or assigns, should, during his or their occupation of the premises, yield and pay for the same to the mortgagor, his heirs, executors, &c., the yearly rent or sum of £50, free from all deductions, by equal half-yearly payments, on the 11th days of July and January in every year, and that it should be lawful for the said mortgagee, his heirs, &c., to have and use such remedies, by distress, for the recovery of the said yearly rent of £50, or any part thereof, as landlords have for the recovery of rents upon common demises; provided that the reservation of such rent shall not prejudice the right of the mortgagee, his heirs, &c., to enter and evict the mortgagor, his heirs, &c., at any time after default shall be made in payment of the moneys secured, or any part thereof. The mortgagee in November, 1837, distrained for the half-yearly rent, which had accrued due on the 11th July, 1837. It was held that, although this mortgage created the relation of landlord and tenant between the mortgagor and mortgagee, nevertheless the mortgagee was entitled to recover in ejectment on a demise laid on the 8th April, 1838, without notice, and to evict the assignees in bankruptcy of the mortgagor. The relation of landlord and tenant existed, with the privilege to evict for default without any notice.

Partridge v. Beer (5 B. & Al. 604) and *Hitchman v. Walton* (4 M. & W. 409) decide that a mortgagor, continuing in possession in pursuance of a proviso

in the mortgage to that effect, *may* be treated by the mortgagee as his tenant, and that therefore the mortgagee, either before or after default, may, as reversioner, sue a stranger for injury to the reversioner; and *Wheeler v. Montefiore* (2 Q. B. 133) decides that a mortgagee, before the day of payment named in the mortgage, cannot sue a stranger in trespass *qu. cl. fr.*, where the mortgagor is, by the mortgage, suffered to remain in possession until that day.

In *Doe Parsley v. Day* (2 Q. B. 147) the Court of Queen's Bench calls in question the decision of the Court of Common Pleas in *Wilkinson v. Hall*, in holding that the agreement in the mortgage there operated as a redemise to the mortgagor for a term of seven years. However, they draw a distinction between the determinate time mentioned in *Wilkinson v. Hall* and the case of *Doe Parsley v. Day*, in which the agreement was that after default it should be lawful for the mortgagee, after giving one month's notice, to enter and make leases, and also to sell the premises, in which case they held that there was no redemise, and that therefore the mortgagee might recover in ejectment, after default, without notice.

Lord Denman, C. J., there at p. 154 says: "Nothing can be clearer than that *after the day of payment*, viz., in Oct. 1837, the time, if any, during which the mortgagor was to hold, was not determined, but altogether uncertain; neither was there any affirmative covenant whatever that he should hold at all. The covenant, therefore, that the mortgagee should not sell, or lease, or even, if it should be construed, should not *enter*, until a month's notice, was a covenant only and no lease."

In *Chapman v. Beecham* (3. Q. B., 730), *Wilkinson v. Hall* being cited, Lord Denman, C. J., says the decision in *Wilkinson v. Hall* was questioned in *Doe Parsley v. Day*, on the authority of a passage in *Shepherd's Touchstone*, 272, which was not brought to the attention of the Court of Common Pleas. In *Chapman v. Beecham* the case was, that B., the owner of the land, agreed to sell it to C., and C. not paying the purchase money, and being indebted to B. in

a further sum, B., by an indenture, to which B. and C. were parties, settled the land to the use of B. in fee, with a proviso that if C. should pay B. the amount, with interest, on a day named, B. should convey to C. in fee. C. covenanted to pay the principal and interest on the day, and that if default were made therein B. might enter, and it was agreed that until default C. should hold and enjoy the land. C. covenanted that as often as it should happen that the interest of the principal sum should be in arrear, it should be lawful for B. to enter and distrain for "the *same interest and the arrears* thereof, and the distress to impound, and in due time to appraise and dispose of, according to due course of law, in *the same manner* in all respects as landlords are authorized to do in respect to distress for arrears of rent upon leases for years." No time appeared to be named for the payment of interest except the one day named for payment of principal and interest. In that point it resembles the case before me; but it appears to have been assumed, in the argument and the judgments, that interest at the same rate continued to accrue after failure to pay the principal upon the appointed day. The action was in replevin, brought by C. B. avowed, setting out the indenture, and averred that £60 had become due for interest accrued payable, with the principal, on the day appointed for the payment of such principal and interest, and a further sum of £140 for three and a half years interest subsequent to the day, and he avowed, under and by virtue of the covenant in the indenture, the plaintiff being long before and at the said time when, &c., in possession, the taking of the chattels on the premises, *as and for and in the name of a distress*, under the power and authority granted, for the said sum of £200 so due and owing for such interest.

For the plaintiff it was contended that the avowry was bad, as shewing no demise, and that the relation of landlord and tenant did not exist, and that the avowry, being "as and for and in the name of a distress," was not a proper avowry under a mere license. Lord Denman, C. J., says,

"I cannot understand why the plaintiff should not have the power of granting the right of distress, his "possession of the land being undisputed. Perhaps the avowry would have been more correct if he had justified in terms by way of leave and license: the deed would support such an avowry." Coleridge, J., says, "The whole stands on the agreement of the parties: the title is immaterial."

The defendant's counsel had argued the case wholly as a license to distrain, as distinguished from a rent charge, and no distinction was made between the interest which had accrued between the execution of the indenture and the day named for payment of principal and interest, during which period it might, perhaps, have been contended that C. was tenant to B., as in the case of mortgagor and mortgagee, for a determinate time, namely, until the day named for payment of principal and interest; but that this point was not made may be accounted for from this, that if the relation of landlord and tenant did exist until that day, and that, by reason thereof, coupled with the covenant as to distress, the right to distrain, "*as and for and in the name of a distress*, did pass in respect of the interest then due, that was a right which must have been exercised within six months after the expiration of the term, and as the distress was not in fact made until nearly four years thereafter, that point could not have been raised in the case, if, indeed, the terms of the covenant authorizing the distress did not exclude the idea of the interest being regarded as *rent reserved*.

In *Doe Snell v. Tom* (4 Q.B. 615) a mortgage indenture contained an attornment clause as follows: "And lastly, for the better securing the said principal money and all interest and expenses, and in contemplation and part discharge thereof, the said Thomas Tom *doth hereby* attorn tenant to the said John Baker, his executors, &c., for all the said premises, at the full and clear quarterly rent of £8 for each quarter of a year from the 25th day of March last, to be recoverable by distress, sale, action of debt or otherwise howsoever; and it was held that inasmuch as the mortgage

also contained a clause for immediate entry, in case of default of payment of the mortgage money, the mortgagee might maintain ejectment, upon default, without notice or demand of possession.

In *Doe Wilkinson v. Goodier* (10 Q. B. 957) the mortgage deed contained a power in the mortgagee to enter and distrain upon the premises for interest, if unpaid, for a certain length of time, "*in like manner as for rent reserved by lease*:" and the lessor of the plaintiff had in fact entered and distrained at a period later than that of the demise laid in the declaration, *but for interest accrued before the day of the demise*; and this act of his, it was contended, constituted a recognition of the defendant as tenant, so as to prevent the plaintiff recovering in ejectment without a notice to quit; and it was held that the absolute conveyance to the mortgagee, in default of payment, at the time specified and long since passed, was not at all qualified by the power to enter and distrain for accruing interest; that the power was wholly collateral, which, though it could not be exercised, unless the defendant was actually in possession, did not create any right inconsistent with that of the mortgagee to recover by virtue of the conveyance to him, *there being no clause that the mortgagor should continue to hold possession so long as he should pay interest*; that the word "rent," as used in the mortgage, did not require that a tenancy should exist *at the time of distraining, but only directed the mode of dealing with the distress*.

In *Pollitt v. Forest* (11 Q. B. 962) an avowry to an action of replevin alleged that the plaintiff at the time when, &c., held the lands, of which the *locus in quo* was parcel, as tenant to the avowants, under and by virtue of a certain demise thereof to the plaintiff theretofore made, upon and subject to certain rents, provisions, conditions and stipulations, that is to say, among other things, that the plaintiff should not nor would, during the continuance of the said tenancy, sell any hay produced during such continuance upon the said demised premises, under the

penalty of 2s. 6d. for each yard of the hay sold as aforesaid, to be recovered by distress *as for* rent in arrear; *averment*, that the tenant did sell hay in violation of this agreement, to wit, to the amount of £100, at the rate of 2s. 6d. per yard, which sum being due to the defendant, he avowed taking the goods as for and in the name of a distress for the said sum so in arrear, and so recoverable by distress, as aforesaid. *Non tenuit* was pleaded, and the verdict was for defendant, and judgment thereon, not *pro retorno habendo*, but, under the Stat. 17 Car. 2, ch. 7, for arrearages of rent. On a writ of error the Court of Queen's Bench affirmed the judgment of the Court of Common Pleas of Lancaster, holding that the 2s. 6d. per yard was a penal "rent." The Court of Exchequer Chamber reversed this judgment, holding that on the record, as pleaded, it must be taken to be a *penalty*. In giving judgment the Court says: "We must assume that the legal effect of the terms, under which the plaintiff held, is set out; and if so, the sum payable is a *penal* sum, by way of punishment, for not spending the produce on the land, *to be recovered, indeed, by way of distress in the same way as* a distress is made for rent in arrear, *but not being itself rent*. We have little doubt that, if the whole instrument was before us, containing the terms of the holding, it would appear that the parties intended the sum to be paid as additional or penal rent; but, on the record, we must assume that the legal effect is set out, and take it to be, as the defendant has pleaded it, a *penalty*. If it be so taken, the defendant had certainly no right to avow in the general form given by 11 Geo. II, ch. 19, which applies to rents only. A penalty is not a rent, as a *nomine pœnæ* is not a rent within Stat. 32, Hen. VIII., ch. 37, *Co. Lit.* 162b.; but after verdict, upon the issue whether he should pay a *penalty*, we should probably hold that it must be presumed that it was proved on the trial either that he had granted by an instrument under seal this penalty to be levied by distress, *or that, if the plaintiff held by demise from the defendants themselves, he had given a license to enter and distrain his own goods for it.*"

In *Doe Roylance v. Lightfoot* (8 M. & W. 553) it was held that a mortgage, which contained a proviso that if the mortgagor should well and truly pay the principal money and interest on a day named, the mortgagee should convey, coupled with a covenant that it should be lawful for the mortgagee, after default, peaceably and quietly to enter into, have, hold, possess and enjoy, did not operate as a redemise to the mortgagor, for the want of an affirmative covenant that the mortgagor should enjoy possession until default, and consequently that the Statute of Limitations ran against the mortgagee from the date of the deed, and not from the date therein named for payment of the money thereby secured. This case the Court of Queen's Bench followed in *Doe Parsley v. Day*.

In *Freeman v. Edwards* (2 Ex. 732), where one, being seised of copyhold lands, in consideration of £1,400, covenanted to surrender them to the use of the defendants, subject to a proviso for redemption, and for the better securing the interest the covenantor granted to the defendants that, as often as the interest should be in arrear for a certain time, it should be lawful for the defendants to enter and distrain for the same, and in pursuance of the covenant the covenantor surrendered and the defendants were admitted, it was held that this was no rent charge but merely a license to distrain. There was no covenant that after admittance of the defendants the mortgagor should retain possession until default. The case was put for the defendants as a grant for a rent charge. Parke, B., says: "If this grant be treated as a rent charge, it could only be so as long as the estate remained in the mortgagor; that is, until surrender by heir and admittance of the mortgagee. It may be that until that time the deed would operate as a grant of a rent charge, affecting the estate, and as a lease for years would be good, though a forfeiture of the copyhold, as against the lord, if he should insist upon it; but after the surrender and admittance the rent charge ceased, for a person cannot at the same moment grant a rent charge and also a fee simple estate in freehold or copyhold land."

It was accordingly held in that case, that, as the covenant only operated as a license, the defendants could not justify by avowing a taking goods, which before the distress had passed to the assignees of the mortgagor, who had become bankrupt.

Now, in this case, Martin and Cowling, arguing for the defendants, contended that, if one grants to another an estate in fee simple by deed, containing a covenant that the grantor shall remain in possession, and that the grantee shall have a right to enter and distrain as often as a certain annual sum should remain unpaid, such a covenant would operate as a grant of a rent charge, and Rolfe, B., answers this argument, as it were, not denying it, but shewing that it was not analogous to the case before the Court, by putting a case analogous to the case before the Court. He says: "But if there be a grant of a rent charge, and *afterwards* a feoffment is made to the grantee, the rent charge is extinguished. It is the same here: admittance means actual possession delivered by the rod."

In *West v. Fritche* (3 Ex. 216) the mortgage deed, which was executed by the mortgagor only, contained a clause, whereby, "for the better and more effectual recovery of the interest of the said sum of £800 by and out of the rents, issues and profits of the said messuage, &c., the mortgagors did attorn and become tenants to the mortgagee, his executors, &c., at the yearly rent of £40, to be paid half-yearly on the 9th day of June and the 9th day of November in every year, during so long time as the said sum of £800, or any part thereof, should remain secured on the said premises, &c. On the argument for the defendant it was contended that the clause of attornment created a tenancy between the mortgagor and mortgagee, and the right of distress was incident to it, citing *Bac. Abr. Distress, A.* Parke, B. in answer to this argument, says, "The plaintiffs could only be liable to rent if they occupied upon the express terms that they would pay rent;" and in giving the judgment of the Court, he says, "We think that the subsequent occupation connected, with

the covenant, constituted the relation of landlord and tenant, so that the mortgagee could distrain."

In *Doe Dixie v. Davis* (7 Ex. 89), where a mortgage contained the usual power of sale, upon default, and a covenant that the mortgagee, his executors, &c., should not exercise the power, nor take any means to obtain possession, until after the expiration of twelve calendar months' notice in writing of his or their intention so to do, and a further covenant that the mortgagor, his heirs, &c., should remain in possession as tenant *at will* to the mortgagee, his executors, &c., yielding and paying therefor, yearly and every year, the clear annual sum of £55, by two equal half-yearly payments, for and in lieu and satisfaction and discharge of the like annual sum of £55, as and for the yearly interest on the principal secured, it was held that the mortgagor was tenant *at will* of the mortgagee at a yearly rent, and that the will had been determined by an assignment of the mortgage, in which the mortgagor had joined, and consequently that the assignee might maintain ejectment against the mortgagor without notice.

In *Doe Barstow v. Cox* (11 Q.B.122), where the mortgagor had by the mortgage deed agreed to become tenant of the mortgagors of the mortgaged premises, at their will and pleasure, at and after the rate of £25 4s. per annum, payable quarterly, it was held that the mortgagor was tenant at will at a yearly rent during such time as he might occupy, and that therefore he was not entitled to a six months' notice to quit, he contending that he was tenant from year to year.

And in *Pinhorn v. Souster* (8 Ex. 763) it was held that a covenant in a mortgage deed, that the mortgagor should continue in possession until default, and hold the premises as tenant at will to the mortgagee at the clear yearly rent of £150, payable quarterly, for which rent it should be lawful for the mortgagee to distrain, but that, notwithstanding, he might at any time determine the tenancy by leaving a written notice on the premises, and that the mortgagee should apply his rent, when received, in satisfaction of the

principal and interest, constituted a tenancy at will at a yearly rent, and consequently that the goods of a stranger on the premises were liable to a distress.

In *Morton v. Woods* (L. Rep. 3 Q. B. 658) the mortgage deed was not executed by the mortgagees, but it contained a clause, whereby it was declared that, "as a further security for the principal and interest for the time being, due from the mortgagor to the defendants, he, the mortgagor, did thereby attorn and become tenant to the defendants, their heirs and assigns, at and from the date thereof, of such premises as were in his occupation, for the term of ten years, if that security should so long continue, at the yearly rent of £800, to be paid on the 1st of October in each year; provided that, notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, before or after the execution of the powers of sale contained in the deed, to enter and determine the term of ten years, and evict the mortgagor and all claiming under him. The mortgagees distrained for the first year's rent on the 15th October, 1866. On the 25th October the mortgagor filed a declaration of insolvency. On the 23rd November he was adjudicated a bankrupt, on a creditors' petition, and the plaintiffs, as creditors' assignees, disputed the mortgagee's right to distrain. On a special case, they having paid the amount of the distress warrant under protest, their contention was that the tenancy was for ten years, and that it was void, the deed not having been executed by the mortgagees; but the Court held that a tenancy at will, at a yearly rent, was created, notwithstanding that the mortgagees had not executed, and that the right to distrain was perfect.

In *Brown v. The Metropolitan Life Assurance Society* (1 E. & E. 832) the mortgage deed contained an attornment clause, as follows, "to the intent that the said Vickers & Co. (the mortgagees) their executors, &c., &c., may have, for the recovery of the interest, accruing on the principal money hereby secured, the same powers of entry and distress as are by law given to landlords for the recovery of rent in

arrear, the said H. Brown (the plaintiff) doth hereby attorn and become tenant from year to year to the said Vickers & Co., &c., &c., at the yearly rent of £125, payable half-yearly." The Court, drawing a distinction between this case and *Chapman v. Beecham*, and *Walker v. Giles* (6 C. B. 662), held that the deed did create the relation of a tenancy at a rent, for which there might be a distress, but the tenancy was put an end to by the assignment of the mortgage to defendants, and that therefore they could not distrain for rent which had accrued due to the mortgagees before the assignment. Lord Campbell, C. J., giving judgment, says, "It would be directly contravening the intention of the parties to hold that this could be converted into a license to seize and sell, when all right of landlord was at an end. The party may say, 'I made myself tenant that you might have a right to seize as landlord, that is, while I am tenant and you are landlord.'"

Turner v. Barnes (2 B. & S. 435) was a case of a mortgage to a Building Society, with an attornment clause at a fixed annual rent. It was a case identical with *Walker v. Giles*, (the authority of which had been much questioned,) in that it contained no clause that the rent was to be applied in reduction of the debt. The Court evaded giving judgment on this point; for, admitting a tenancy to have been created, they held that it was a tenancy at will only, and that this tenancy had determined by the death of the mortgagor, the tenant, and that consequently a distress after the determination of the term could not be sustained under 8 Anne, ch. 14, sec. 8, which requires that in such case the distress must be made during the continuance of the possession of the tenant, and within six months after the expiration of his term.

There is a material difference, both in form and substance, between a mere license to distrain and an attornment. The former is simply collateral: it creates no tenancy; the latter creates a tenancy and gives the remedy by distress as extensive as in other cases of tenancy: Davidson's Prec. in Conveyancing, Vol. 2 pp. 741, 751 and 570, 571. A mort-

gagor, then, although he may be tenant of the mortgagee, and as such entitled or not entitled to notice, according to the terms of the mortgage, yet may not be a tenant at a rent, unless the mortgage contains an attornment clause, or a clause equivalent thereto, authorizing a distress for the interest, in the nature of rent reserved, in which case his tenancy will be subject to the incidents of an ordinary tenancy; or he may retain possession, subject to a license to distrain collateral, although not tenant at a rent, to which license the ordinary right of a landlord to distrain the goods of a stranger on the premises is not incident.

Now, to apply the principles of the above cases to the one before me. Prior to the passing of 27 and 28 Vic. ch. 31, I am aware that a special form of mortgage had come into very general use, containing a proviso that until default the mortgagor would hold possession, as tenant of the mortgagee, under a demise, then next set out in the deed, which contained an express demise from the mortgagee to the mortgagor at a rent, the same as the interest of the principal secured, to have and to hold for the term of years during which the principal was agreed to remain outstanding on the security, with a proviso that, in case of default in payment of this rent for a stated period after becoming due, the mortgagee might enter and evict the mortgagor and sell and realize the principal, notwithstanding the demise. Upon the passing of the above Act this form became into disuse as more expensive than the short form provided by the Act, and under the impression that, in substance, the deed in the form of the Act effected the same object, namely, the utmost security to the mortgagee for the prompt payment of his interest in the nature of rent. The question I believe now for the first time comes up for adjudication; for, although there is nothing upon the record to shew that the mortgage in this case is a mortgage under the Act, still the covenant set out is identical with that set out in the second column in the form given in the Statute at the 15th paragraph, and therefore the decision in this case must be the same as could be upheld under the Statute. It was

stated, moreover, in argument, that the mortgage is in fact one under the Act.

The language of the covenant is, as it appears to me, very different from that used in *Chapman v. Beecham*, *Doe Wilkinson v. Goodier*, and *Pollit v. Forest*. The covenant is not, that the mortgagee may "distrain for the interest" *in like manner* as landlords are authorized "to do in respect of distress for arrears of rent upon leases for years," nor "in like manner as for rent reserved by lease"; nor is the covenant in a negative form, imposing a penalty for which the mortgagee may distrain *as for rent* in arrear, as in *Pollit v. Forest*; but it is that, if the mortgagor make default in payment of interest, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor on the *said lands*, &c., or any part thereof, and by distress-warrant to recover, "*by way of rent*," (that is, as it appears to me, to recover the interest *as rent*, *in the character of rent*) reserved, *as in the case of a demise* of the *said lands*, &c.; that, in fact, the interest shall be payable as rent reserved by the mortgagee, as in the case of a demise (which this indenture is to be taken to be) of the *said lands* from the mortgagee to the mortgagor.

This, it appears to me, is the natural construction to put upon the intention of the parties, as expressed in these terms, coupled with a clause that the mortgagor shall remain in possession of the lands, and his occupation in pursuance of such agreement.

Upon the whole, I have come to the conclusion that a clause in a mortgage, that the mortgagor shall continue in possession, coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in the terms contained in this instrument, does create the relation of landlord and tenant at a fixed rent; that by the indenture of mortgage, in this case, the tenancy created was until the day of re-payment of the principal, for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the

premises. I am, however, of opinion, that the demurrers to these avowries must prevail; for in neither of these avowries is it alleged that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of the distress, or at any time, which are matters, as it appears to me, necessary to be averred. The distress appears to have been made only for the interest which accrued due up to the day of payment of principal named in the mortgage, and, treating the tenancy to that day to be for a determinate period, and not at will, it is important to enquire whether the will was determined in any way on that day or at any time prior to the distress; for if the distress was made after the will had been determined, and the mortgagor continued in possession as a trespasser, then the distress can only be sustained as a distress, after the determination of a term, under 8 Anne, ch. 14, in which case it would seem to be necessary to aver that it was made within six months after such determination and during the possession of the same person, who had been a tenant; and it is for the avowant to shew clearly his right to distrain: *Haacke v. Marr* (8 C. P. 441).

The second avowry is pleaded as a mere license or power of distress collateral. As such it could not authorize the taking, by way of distress, the property of third persons on the premises, and I do not see that the averment, that the plaintiff claims the goods, &c., seized, by virtue of "*an alleged*" conveyance thereof to him from the mortgagor, subsequent to the indenture, with knowledge and notice thereof, and that the plaintiff suffered the goods to remain on the premises, places the case in any different position from that of any third person leaving his goods in the possession of a person known to be a tenant, in which case a mere license to distrain could not affect his goods.

Unless, then, the right to distrain can be upheld as a right of distress incident to a tenancy, (which I think it can, if, as was admitted in argument, the mortgage does

contain a clause providing for the mortgagor continuing in possession, coupled with the occupation in fact, in pursuance of that provision,) the defendants cannot justify the taking the goods of a third party, nor, as it would seem, upon the authority of *Brown v. The Metropolitan Life Insurance Company*, could they justify the taking the goods of the mortgagor himself as under a license, if the tenancy had been determined at the time of the distress.

If I am right in the conclusion I have arrived at, that the intention of the parties was to create a tenancy, rendering rent, the language of Lord Campbell in that case, then, becomes appropriate to this, and, by holding that such a tenancy was created, I think I only conform to what may reasonably be collected from the instrument, (not as it appears upon the record, but as it was admitted to be in argument,) to have been the intention of the parties.

I express no opinion upon the demurrer to the plea to the avowry, having arrived at the conclusion that the avowries themselves are defective. It may possibly be found inappropriate to an amended avowry. In the view, however, which I take it is inexpedient, in the present state of the record, to express any opinion as to it. The judgment will be to allow the demurrers to the avowries, with liberty to the defendants to amend.

Judgment for plaintiff on demurrer.

MCCOLL V. WADDELL.

County Court appeal—Verdict by consent subject to opinion of Court.

After the evidence had been taken in a cause in the County Court a verdict was entered by consent for plaintiff, subject to the opinion of the Court upon the whole case, with power to the Court to reduce the verdict, &c.

Held, that there was no right of appeal to a Superior Court from the decision of the Judge, as not being a case within C. S. U. C. ch. 15, s. 67.

This was an appeal from the County Court of the United

Counties of Northumberland and Durham, and came on for trial, at the sittings of that Court, on the 10th December, 1867. After the evidence had been taken it was agreed between the parties that a verdict for two hundred and fifty-two dollars and seventy-five cents should be taken, subject to the opinion of the Court upon the whole case: the Court to have power to reduce the verdict, and, should it be reduced, to grant or refuse a certificate. It was noted that the verdict was thus taken at the suggestion of the Court.

Upon hearing the case argued, the Court was of opinion that the verdict for the plaintiff should stand. Against this decision the defendant appealed, and the preliminary question was raised whether an appeal would lie under these circumstances.

Roaf, Q. C., and *Jarvis* appeared for the appeal.

Spencer, contra, cited *Dudgeon v. Thomas*, 1 McQueen, H. L. Ca. 714; *Robin v. Hoby*, 2 McQueen, 488.

[The CHIEF JUSTICE referred to *Gossage v. Can. Land & Emigration Co.* 24 U. C. 452.]

HAGARTY, C. J., delivered the judgment of the Court.

By the 22 Vic. c. 15, s. 67, "In case any party to a cause, on the common law side, in any County Court, is dissatisfied with the decision of the Judge upon any point of law arising upon the pleadings, or respecting the reception or rejection of evidence, or with the charge to the jury, or with the decision upon any motion for non-suit, or for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, the Judge, at the request of such party, &c., shall stay proceedings, &c," to enable him to appeal the case. Now we fail to see that this appeal comes within any of the causes for which an appeal lies. The parties agree to leave the whole case to the Judge. He was to act, as the jury might, on the evidence before him, and he had the further power to reduce the verdict, if that evidence did not sustain, to the full extent, the damages consented

to. He found that the verdict for the plaintiff should stand as it had been taken. The defendant says he ought to have found the other way. On what authority are we to say he should have found as the defendant contends? Does the Act enable us to review his decision, and pronounce judgment according to the view we may take of the evidence? We think we have no such authority.

Suppose the case had been left to any one besides the Judge, and he had awarded that the verdict should stand; and suppose an application to set aside that award, in the Court below, had been made, and the Judge had refused it, could the defendant have appealed from his decision to the Superior Court? We think not; because it does not come within any of the causes for which an appeal is given.

There are two English cases bearing upon the point now before us. *Robin v. Hoby* (2 McQueen, H. L. 488) and *Dudgeon v. Thompson* (1 McQueen, 714) seem to be strong authorities that, where a course is adopted by consent, giving a power to the Judge or Court to decide on facts and law, in a manner not possessed by them, except by such consent, there is no appeal. As the Lord Chancellor says, "The cause, in which this matter had been conducted, had constituted the Court, not a Court deciding *secundum cursum curiæ*, but deciding in the character of arbitrators." At page 725 of 1 McQueen the same Judge points out that, when a verdict is taken subject to the opinion of the Court, upon a case stated, the arrangement being that the Court shall say, upon reading all the evidence, whether the verdict ought to be for the one or the other, drawing such inferences of fact, from what is proved, as the jury ought to have drawn, "in such a case" (he says) "there is no possibility of bringing the decision by way of appeal under review, because the parties have by agreement substituted the Court for the jury, and they are bound to take for better or for worse whatever may be their finding."

When a special case is stated all the facts are admitted, and the judgment is the conclusion of law thereon. This, in the Superior Courts, may be carried to the Court of Error and Appeal by special statutable directions.

It is sufficient to say that here the parties have bound themselves to abide by the decision of the Judge, not according to the ordinary course of the Court, but giving him a power he could not otherwise have exercised, there is no such consent to abide by the decision of the Court of Common Pleas.

We also refer to *Gossage v. Canadian Land and Emigration Co.*, in this Province, in Appeal, but not reported.

DICKINSON v. BUNNELL.

Insolvency—Proof of debt by creditor—Fi. fa. by same creditor set aside.

The plaintiff issued a *fi. fa.* lands on 7th June, 1865, and renewed it from time to time until 4th June, 1867. On 30th March, 1867, defendant obtained his discharge in Insolvency. Plaintiff had proved his claim for the full amount of the judgment in the Insolvent Court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so: The Court set the *fi. fa.* aside with costs.

In Hilary Term, 1868, *Moss* obtained a rule calling on plaintiff to shew cause why the writ of *fi. fa.* lands, dated 7th June, 1865, issued on a judgment recovered 4th Oct., 1864, or the last renewal thereof, dated 4th June, 1867, should not be set aside with costs:

1. Because no judgment was in force to warrant the writ.
2. That when writ was last renewed there was no judgment in force.
3. That defendant, on 30th March, 1867, obtained his discharge, or a confirmation of discharge, under the Insolvent Act, and the judgment was thereby discharged.
4. That no seizure had been made at any time, and plaintiff proved his claim on the judgment, and was therefore not entitled to keep the writ in force.

In Michaelmas Term last *Meyers* shewed cause, citing *Mitchell v. Kent*, 2 Gl. & J. 293; *Ex. p. Botcherly*, Ib. 369;

Stedd v. Gascoign, 8 Taunt. 527; *Newton v. Scott*, 9 M. & W. 434; *Phillipps v. Sherville*, 9 Jur. 179.

Osler, in support of the rule, cited 2 *Arch. Bankruptcy Acts*, 963, 965.

HAGARTY, C. J., delivered the judgment of the Court.

A summons was issued as far back as 24th December, 1867, asking the same relief as is sought by this rule, which was enlarged to Term.

It appears that judgment was recovered on 4th October, 1864, and *fi. fa.* lands issued to Sheriff of Brant, and that it has been kept renewed in Sheriff's hands; that on 8th March, 1866, defendant made an assignment under Insolvent Act, and he obtained his certificate of discharge on 30th March, 1867; plaintiff was mentioned as a creditor in said judgment in defendant's schedule, and filed his claim against defendant with the assignee, and attended to oppose his discharge.

Defendant swears that he had not, when writ issued, or up to obtaining his discharge, any lands; that he has commenced business again; that the writ injures his credit, and plaintiff's attorney has been notified to withdraw it. There has been no seizure under the writ.

It is shewn that plaintiff made his claim on the judgment in the Insolvent Court, and also swore that he had no security except the judgment.

On plaintiff's side it is alleged that defendant had some interest in certain specified lands; but this is denied on his part.

It is not easy to understand for what legitimate purpose the plaintiff persists in keeping his writ against lands renewed in the Sheriff's office. He does not attempt to deny that he has proved on the estate for this very judgment debt and costs, and, therefore, if any property, real or personal, belonging to defendant, can be found, it must go into the common fund, in which he and the other creditors will share ratably.

It is objected that we have no power to interfere with

these writs. There certainly ought to be a power in some jurisdiction to give relief in such a case.

The renewed writ given to the Sheriff, in June, 1867, has long since expired, and it is not suggested that a fresh renewal has been issued; so that nothing but a question of costs is really at stake.

We have examined the cases cited, and also a case of *Ex. p. Underwood* (14 L. T. N. S. 230) and the cases there cited in the notes. Even if the Judge in Insolvency had the power to give relief in this matter, as to which we give no opinion, we think this Court has full power over writs issued on its judgments. If the claim on the judgment had been settled or satisfied between the parties, it is a common thing to apply to the Court to set aside or stay proceedings on an execution issued thereon. Here the plaintiff, proving his debt on the judgment, becomes interested in the general assets, and has no further right to proceed against the insolvent's estate, at all events, as to property on which no previous seizure had been made. He came in voluntarily and proved on the estate.

We think he cannot be allowed to issue the renewed *fi. fa.*, and that it ought to be set aside.

As this motion was rendered necessary by plaintiffs refusal to withdraw it, after notice that a motion would be made if he refused so to do, we think the defendant should have his costs.

Rule absolute.

ROYAL CANADIAN BANK V. MINAKER.

Bills of exchange and promissory notes—Pleading.

To an action on a promissory note for \$800 defendant pleaded, in substance, that D. & Co. had contracted with defendant for delivery to him of plaster to the value of \$1,000, for which defendant agreed, on delivery, to pay by accepting D. & Co.'s draft at three months, payable to their own order; that D. & Co., after having delivered but \$200 worth of plaster, requested defendant, who agreed to accept and did accept their draft, upon their promise and agreement that defendant should upon its maturity pay no more of it than he had received value in plaster; that, thereupon, D. & Co. being indebted to plaintiffs in \$50,000, indorsed and delivered the draft so accepted to plaintiffs, who received it as security for and on account of said debt, with the full knowledge and notice of the facts *hereinbefore* stated; that when said draft matured D. & Co. had delivered to defendant no more plaster than to the said value of \$200, and plaintiffs and D. & Co. agreed that defendant should only pay \$200, and that defendant should make and deliver to D. & Co., or order, and D. & Co. should indorse and deliver to plaintiffs said promissory note for \$800, and that said note should be taken and received by D. & Co. and plaintiffs upon the same agreement and terms, as to delivery of plaster, as the draft for \$1,000 had been made and delivered upon:

Held, on demurrer, a bad plea.

Declaration, on promissory note for \$800, made by D. H. Minaker & Co., dated 14th May, 1868, payable to defendants, Deweys, under name of J. B. Dewey & Co., or order, two months after date, and endorsed by J. B. Dewey & Co. to plaintiff, alleging presentment, protest and non-payment

Plea (by defendant, D. H. Minaker), that before making the bill of exchange, afterwards mentioned, and the promissory note declared on, J. B. Dewey & Co. were indebted to plaintiffs in \$50,000, and before making said bill of exchange and promissory note, said J. B. Dewey & Co. contracted and agreed with defendant, D. H. Minaker, to deliver to him \$1,000 worth of plaster, for which said defendant should accept (in the name of Minaker & Bro.,) J. B. Dewey & Co.'s bill of exchange for \$1,000, at three months, payable to order of J. B. Dewey & Co.; that J. B. Dewey & Co. delivered only a small part of said plaster, to amount of \$200, and requested said defendant to accept

said draft, on their promise and agreement that said defendants, Minaker & Bro., should only pay value of plaster received, when bill fell due; that on faith of such promise and agreement, defendant accepted said draft in name of Minaker & Bro., and said J. B. Dewey & Co. endorsed same to plaintiffs, who took and received same as security for and on account of said pre-existing debt of J. B. Dewey & Co. to them, and with full notice, &c., of facts above stated; that when said draft became due, J. B. Dewey & Co. had only delivered \$200 worth of plaster, and plaintiff and J. B. Dewey & Co. agreed that defendant should only pay \$200, and that said defendant, D. H. Minaker, should make and deliver to J. B. Dewey & Co., or order, and said J. B. Dewey & Co. should endorse and deliver to plaintiff the said promissory note for \$800, in declaration mentioned, and that said note should be taken and received by J. B. Dewey & Co. and plaintiff upon same agreement and terms, as to delivery of plaster, as bill of exchange had been made and delivered upon; that said defendant paid \$200, and made and gave said promissory note for \$800, which was received by plaintiff on terms and conditions aforesaid; that J. B. Dewey & Co. did not deliver any more plaster, of which plaintiffs had notice before said note became due; that there was no value or consideration for said note, except as aforesaid, and plaintiff took same with full notice and knowledge, &c.

Demurrer :

1. That plea set up a verbal agreement inconsistent with note therein mentioned, and contradicting same.
2. Said plea shewed consideration for said note, and that plaintiffs held same for value.
3. Said plea set up partial failure of consideration for said note, and did not shew total failure of consideration.
4. No partial failure of consideration to any distinct part of said note that could be set up as a defence to note, or any part thereof.
5. Said plea did not state any time when plaster therein mentioned was to be delivered.

6. Facts set forth only shewed a ground for cross action between said Minaker and Dewey, and if they constituted defence between maker and payee of said note, not available against plaintiffs, who were endorsees for value.

Hector Cameron, for the demurrer, cited *Gooderham v. Hutchison*, 5 C. P. 241; *Ch. Bills*, last ed. 51; *Kellogg v. Hyatt*, 1 U. C. 445; *Coulter v. Lee*, 5 C. P. 201, 350; *Hill v. Ryan*, 8 U. C. 443; *Henderson v. Cotter*, 15 U. C. 345; *Southatt v. Riggs & Foreman v. Wright*, 11 C. B. 481; *Sulby v. Frean*, 10 Ex. 535; *Warwick v. Nairn*, 10 Ex. 762; *Wells v. Hopkins*, 5 M. & W. 7.

J. D. Armour, contra, cited *Swift v. Tyson*, 16 Peters 1; *Keans v. Durell*, 6 C. B. 596; *Gillett v. Whitmarsh*, 8 Q. B. 966; *Blain v. Oliphant*, 9 U. C. 473; *Davis v. Jones*, 17 C. B. 625; *Pym v. Campbell*, 6 E. & B. 370; *Wallis v. Littel*, 11 C. B. N. S. 369; *Lindley v. Lacy*, 17 C. B. N. S. 578; *Agra & M. Bank v. Leighton*, L. R. 2 Ex. 56; *Webb v. Spicer*, 13 Q. B. 886, 894; *Solomon v. Webb*, 3 H. L. Ca. 510; *Harpér v. Paterson*, 14 C. P. 538, S. C. upheld in Appeal (unreported).

GWYNNE, J.*—With a view to determining whether the plea offers a sufficient defence to this action, two questions appear to present themselves for consideration:

Firstly.—Do or not the matters alleged in the plea, in relation to the bill of exchange, therein mentioned as having matured before the making of the promissory note declared upon, shew a sufficient defence to an action at suit of the present plaintiffs against the defendants, as the acceptors of that bill, if that was the action now pending?

Secondly.—If those matters do not shew a sufficient defence to such an action, do the subsequent matters, alleged to have taken place after the maturity of the bill, shew a sufficient defence to this action upon the note?

* Hagarty, C. J., and J. Wilson, J., not having been present during the argument, delivered no judgments.

The plea, in substance, alleges that Dewey & Co. entered into a contract with the defendant for the delivery to him of a large quantity of plaster to the value of \$1000, for which, when delivered, the defendant agreed to pay by an acceptance of Dewey & Co.'s draft, payable at three months from the date of the draft to their order; that Dewey & Co., after having delivered plaster under that contract to the value of \$200 only, requested the defendant, and he agreed, to accept and did accept Dewey & Co.'s draft, payable to their order, three months after date, for the sum of \$1000, upon the promise and agreement, then made by Dewey & Co., that the defendant should, upon the maturity of the bill, pay no more of the said acceptance than he should have received value for in plaster at that time; that thereupon Dewey & Co., being indebted to the plaintiffs in the sum of \$50,000, endorsed and delivered the bill so accepted to the plaintiffs, who received the same as security for and on account of such debt, and with full knowledge and notice of the facts *hereinbefore* stated. The plea then alleges that when the bill matured, Dewey & Co., had delivered to the defendant no more plaster than to the said value of \$200.

Now, the facts here stated, and, for the purpose of the present enquiry, admitted by the demurrer, shew that at the time of the acceptance value to the amount of \$200 had already been received for it by the acceptor, and further, that Dewey & Co. had three months during which they might, at any one time, or from time to time, increase the amount for which, upon the condition, on which the bill was accepted, that defendant was to be liable if the bill should be in the hands of Dewey & Co. at maturity. This agreement seems to have been not only provident and proper, but perhaps necessary to enable the defendant, as against Dewey & Co., in the case the bill should be in their hands at maturity, to set up a partial failure of consideration to the extent of the value of the undelivered plaster, as a defence to an action by Dewey & Co. upon the bill, instead of being driven to a cross action upon the contract

for non-delivery of the plaster: *Clark v. Lazarus* (2 M. & G. 167); *Trickey v. Larne* (6 M. & W. 278).

But, as between the plaintiffs, being the holders of the bill, and the defendant, the case is different, for negotiability of the bill appears to have been the sole object of its creation. If a purchaser from the drawer, although with notice of the consideration for the acceptance, should be affected precisely in the same manner as the drawer, the bill would to a great extent be divested of that quality of negotiability for which alone it was created. It has therefore been long well established by authority and universal practice that a purchaser for value, with notice of an accommodation bill, shall recover against the acceptor to the full amount of the value given by him for the bill.

The question, then, comes to this, does the plea allege or shew that the plaintiffs gave no value, or only partial value, and if the latter, was it restricted to the \$200 for which the acceptor had received value? The knowledge which the plea alleges the plaintiffs to have had, when the bill was endorsed to them, appears to have been, that the defendant had accepted it, partly for value already received, and partly for Dewey & Co.'s accommodation, coupled with their undertaking to deliver to the defendant the residue of the value in plaster. Now such knowledge cannot, upon any principle, affect the plaintiffs to any greater extent than they would have been affected in the case of a bill which they had notice was accepted *wholly* for Dewey & Co.'s accommodation, in which case it would have been the drawer's duty to take up the bill at maturity, or to supply the acceptor with the full amount to enable him to retire it; but the knowledge that a bill has been accepted *wholly* for the accommodation of the drawer causes no check to its negotiability, and no answer to an action at the suit of an indorsee for value before or even after its maturity: *Smith v. Knox* (3 Esp. 46); *Charles v. Marsden* (1 Taunt, 224); *Stein v. Yglesias* (1 C. M. & R. 565); *Parr v. Jewell* (16 C. B. 684).

The averment as to the knowledge which these plaintiffs

had, when they took the bill, as to the circumstances attending its creation, involves, moreover, no allegation that they had any knowledge or notice that, in the interval which had elapsed since the acceptance, the undertaking of the drawer, as to the delivery of the plaster, had not been fulfilled.

Admitting, however, that plaster had not been delivered to any greater value than \$200, the plaintiffs, being the holders, would in any event have been entitled to recover to the extent of the \$200, and *primâ facie* to the full amount of the bill: partial failure of consideration could only have been set up against them by an express averment that they gave no more than \$200, or such further amount, if any, less than the whole, as the defendants should be prepared to establish was the consideration given by the plaintiffs: *Boden v. Wright* (12 C. B. 448); and it appears to me that in this plea the same preciseness of allegation is as necessary as would have been necessary in a plea to an action on the bill; for it is only by affecting the plaintiffs' title to the bill that the defendants can affect their title to the note, which is shewn to have been made in substitution for the bill. Instead of averring that the plaintiffs gave no greater value than the \$200, to which amount, under any circumstances, the defendant was liable, or confining his plea to the residue, with an averment that the plaintiffs never gave any value, the defendant states facts in his plea with a view, doubtless, of insisting that the plaintiffs were not holders for value at all, but which are quite consistent with the fact that they were so to the full amount of the bill; for the plea states that Dewey & Co., being indebted to them in \$50,000, endorsed the bill to them, and that they took and accepted it "as security for and on account of that debt." This endorsement sufficiently appears to have been before the maturity of the bill, and may have been while it had a considerable time to run. The expression, "as security for and on account of," may be susceptible of different constructions; namely, that this bill for \$1000 was taken as a security for the \$50,000. This

would be consistent with the fact that, in consideration of the security, the plaintiffs contracted that their remedy for the whole \$50,000 should be suspended until the maturity of the bill, *or* that the plaintiff took the bill on account of the debt, but in lieu of an equal amount, viz., \$1000; *or*, to put it no higher, that they took it as security for \$1000, part of the debt, under a contract that the remedy as to that amount should be suspended. Any one of these constructions would shew value for the endorsement. No consideration is more frequently made the foundation of bill transactions than pre-existing debts, and there is only one case, of a stolen bank note payable on demand, in which it has ever been questioned: *Chitty* on Bills, 51. Here there is no averment that the plaintiffs were not the holders for value. In all the forms of plea, which I have seen in books on pleading or in reported cases, when the title of the holder is assailed for want of value, an express averment is contained that the plaintiff is a holder without any value or consideration; or without any other than certain specific facts pleaded, necessarily importing absence of consideration, shew, and upon principle this seems to be necessary, for, possession implying value, it must be expressly negatived.

I come, then, to the conclusion that there is no defence sufficiently pleaded in law to have barred the plaintiff's recovery in an action on the bill: *McKenna v. Dowdall*, (8 Ir. Com. L. Rep. Q. B. 70). The result is that the defendant must be taken to have been the plaintiff's debtor to the full amount of the bill on its maturity, and, being such, the plea alleges that thereupon the plaintiffs and Dewey & Co. agreed that the defendant should pay \$200 in cash and give his promissory note, at two months, payable to Dewey & Co., or order, which they should endorse to the plaintiffs, and that such note should be taken and received by Dewey & Co. and the plaintiffs upon the same agreement and terms, as to the delivery of the plaster, as the said bill of exchange had been. Now, the plaintiffs were no parties to any agreement as to the delivery of the

plaster, so far as the bill of exchange was concerned, and it is not here alleged that the plaintiffs, who are here shewn to have been indorsees of the note from the moment of its creation, and to have been the persons from whom, in fact, if they were the indorsees of the bill for value, the consideration for the note wholly proceeded, ever entered into any agreement that they should not look to the defendant, if Dewey & Co., during the currency of this note, should fail to deliver the plaster: that the plaintiffs' right to recover against the defendant upon the note was to be affected by the non-delivery of the plaster is only sought to be inferred from the agreement, which, as I read the plea, is alleged to have been made between Dewey & Co. and the plaintiffs. It may be intended to be, but is not, alleged that the defendant was a party to that agreement. I infer that he was not, and that the plea purposely abstains from expressly alleging that he was, from the fact that, and for the reason that, no consideration is alleged as moving from the defendant to support an agreement with him not to enforce payment of the note by the defendant, unless Dewey & Co. should before maturity deliver the plaster. The agreement, as alleged, is, in my opinion, open to the construction that the plaintiffs in the ordinary course agreed with Dewey & Co. to renew the bill for the benefit of the defendant and Dewey & Co., so as to give Dewey & Co. further time to fulfil their contract with the defendant as to the delivery of the plaster, of the non-delivery of which, so far as appears by the plea, the plaintiffs may then for the first time have become aware, and to give the defendant further time to pay his debt then due to the plaintiffs. The plea then proceeds, that thereupon, that is, upon this agreement between the plaintiffs and Dewey & Co. being made, the defendant made the note declared on, which was received by Dewey & Co. and the plaintiffs, upon the terms and conditions aforesaid, and that Dewey & Co. did not deliver any more plaster, of which the plaintiffs before the note became due had notice; and that there never was any value for the making of the said promissory

note except as aforesaid, and the plaintiffs took and received the same from Dewey & Co. with notice of the facts aforesaid, and without any value therefor, excepting the pre-existing debt aforesaid.

The "pre-existing." debt here meant is, it may be assumed, the debt of Dewey & Co. to the plaintiffs, for which the prior bill of exchange had been endorsed, and which, having been good value for the endorsement of that bill, would have been good consideration for the note and its endorsement; but the bill having been at its maturity in the hands of the plaintiffs, as the holders for value, as the plea I think sufficiently shews, or at least does not sufficiently deny, and the defendant having thereupon become the plaintiffs' debtor on the bill to its full amount, there was, as appears by the plea itself, at the time the promissory note was made, *another pre-existing* debt, namely, the defendant's own debt to the plaintiffs on the bill, the giving of further time to pay which constituted direct value issuing from the plaintiffs to the defendant for the note.

The plaintiffs, then, having accepted the note, together with the payment of \$200 in substitution for their claim against the defendant upon the bill, indefeasible as it was, so far as it appears by the plea, there is no consideration whatever stated to support a promise, if any had been averred to have been made by the plaintiffs, to the effect that they would not enforce payment of the note by the defendant at its maturity, unless in the meantime the plaster should be delivered by Dewey & Co.

I am of opinion, therefore, that the plea offers no sufficient defence to this action.

In the view which I have taken I have not thought it necessary to refer to the objection, that the agreement stated as affecting Dewey & Co.'s right to sue on the bill, in the event of the non-delivery of the plaster, was verbal only, and inconsistent with the contract involved in the acceptance. If my opinion turned upon that, I should hold the plea to be sufficient, I think, in that respect, because

the alleged agreement is stated as affecting the consideration of the acceptance, and the rule is, that anything affecting the consideration of a bill or note may be pleaded as parol, but anything independent of or collateral to it, and in defeasance of the right to recover upon it, assuming the consideration to have been sufficient, must be pleaded to be in writing. As affecting the plaintiffs' right to recover in this action, my opinion would have been the same as I have already declared it to be, even if the agreement referred to had been alleged to have been in writing: *Foster v. Foley* (1 C. M. & R. 703); *Rawson v. Walker* (1 Stark 361); *National Assurance Association v. Stoy*, (11 W. R. 959).

But, if I could have come to the conclusion that the plea contained an averment that, at the time the note was made, the plaintiffs had agreed with the defendant not to sue upon the note, unless in the meantime Dewey & Co. should deliver the plaster, and only to the extent that they should deliver, that, in the view which I have taken of the consideration shewn by the plea to have been given by the plaintiffs for the note, would have been an agreement independent of and collateral to the note, and inconsistent with the contract involved in it; and therefore, as to such an agreement, the objection to the plea would in my opinion have been fatal. Judgment therefore will be in favour of the demurrer.

Judgment for plaintiffs on demurrer.

FREEMAN V. MCCARTHY.

Accord and satisfaction after action—Pleading.

To an action on the common counts for goods sold and delivered, defendant pleaded, in effect, that after action plaintiff and defendant accounted together, and that upon such accounting the sum of \$60 and no more was found due from defendant to plaintiff on such accounts, and it was then agreed between them that defendant should deliver, and he did deliver, to plaintiff, who then accepted and received from defendant, a certain promissory note for \$60, in full satisfaction and discharge of the several causes of action, *and of all the plaintiff's costs of suit* :
Held, a good plea in accord and satisfaction.

Declaration, on common counts for goods sold.

Plea, That after the last pleading, &c., and before this day, and within eight days now last past, and on 30th of October, 1868, plaintiff and defendant accounted together of and concerning all the matters then in dispute in this suit, and upon such accounting the sum of \$60 was found to be due from defendant to plaintiff on such accounts so stated between them; and it was then agreed by and between plaintiff and defendant that defendant should deliver and defendant did accordingly then deliver to plaintiff, who then accepted and received from defendant, the promissory note of defendant of that date, whereby defendant promised to pay the firm of "Freeman Bros.," of which firm plaintiff then and still was a partner, \$60, fifteen days after date, in full satisfaction and discharge of the several causes of action in the declaration above mentioned and of all the plaintiff's costs of this suit.

Demurrer, That the said plea shewed no accord and satisfaction as to the costs of this suit.

McKelcan, for the demurrer, cited *Cumber v. Wane*, 1 Sm. L. C. 6 ed. 301; *Cook v. Hopewell*, 11 Ex. 555; *Goodwin v. Cremer*, 18 Q. B. 757; *Down v. Hatcher* 10 A. & E. 121.

R. Martin, contra, cited *Wilkinson v. Byers*, 1 A. & E. 106; *Sibree v. Tripp*, 15 M. & W. 23, 32, 38; *Melville v. Carpenter*, 11 U. C. 132; *Hall v. Warner*, 2 U. C. 392;

Llewellyn v. Llewellyn, 30 D. & L. 318; *Cooper v. Parker*, 15 C.B. 822; *Smith v. Monteith*, 13 M. & W. 427; *McKellar v. Wallis*, 8 Moo. P. C. C. at p. 401; *Turner v. Collins*, 15 Jur. 177.

GWYNNE, J. (a)—The only objection which has been made to the plea demurred to is, that, as is contended, it shews no accord or satisfaction, which is sufficient in law, as to the costs of the suit; and upon this objection I am of opinion that the demurrer cannot prevail.

Payment, or accord and satisfaction, before action, was always sufficiently pleaded to the promises and undertakings in the declaration mentioned, if the action was in assumpsit, or to the debt, if in debt; but if the payment or accord was after action brought, then it was necessary that the plea should be applied as well to the damages and costs, or at least to all damages sustained by the plaintiff, this term "damages" being construed to comprehend costs: *Francis v. Crywell* (5 B. & Al. 886); *Beaumont v. Greathead* (2 C. B. 494); *Thame v. Boast* (12 Q. B. 808); *Goodwin v. Cremer* (18 Q. B. 757).

In *Thame v. Boast*, to an action in assumpsit upon a cheque for £25, wherein the plaintiff laid his damages at £50, the defendant pleaded, to the further maintenance of the action, the payment since the commencement of the action of a large sum of money, to wit, £60, in full satisfaction and discharge not only of the promise and damages in the declaration mentioned, but also of the costs then incurred, which sum the plaintiff then accepted in full satisfaction and discharge of the promise and damages, and also of said costs. The defendant replied that the defendant did not pay, nor did the plaintiff accept the sum, in the plea mentioned, in full satisfaction of the promise, damages and costs as alleged, whereon issue was joined. At the trial it appeared that defendant tendered the plaintiff £25, the

(a) The Chief Justice and Wilson, J., having been absent during the argument, delivered no judgments.

amount of the cheque; that plaintiff received the sum, but would not accept it as payment, as a writ had been sued out and costs incurred; that defendant offered plaintiff a sovereign to pay these costs, but that the plaintiff said he would pay them himself, and promised to send defendant the cheque the next day. It was contended that the costs not having been paid by the defendant the plea was not proved, and that there should be a verdict, with nominal damages, for plaintiff. It was left to the jury to say whether the plaintiff had his expenses offered to him, and whether he had waived them, and they said they thought he had, and found for defendant. Liberty was reserved to the plaintiff to move to enter a verdict for nominal damages, if the Court should be of opinion he was entitled to such verdict. A motion was made accordingly, and after argument the Court sustained the verdict, holding that the debt having been paid and accepted, the plaintiff could not proceed for nominal damages, upon the authority of *Beaumont v. Greathead*, nor for costs only, independently of some damages, and they thought the plea proved. In that case it was contended that even if an agreement was proved, that £25 should be taken in discharge of the £25 due on the cheque and of damages and costs, it would not be binding, inasmuch as the demand was liquidated and admitted; but Erle, J., disposes of this objection by saying: "We cannot say that in the present case the plaintiff would have been sure of a verdict," shewing that doubt sufficient to uphold the payment and acceptance of £25 in satisfaction of the debt and damages and costs; and he further adds: "I have known it many times laid down that a defendant might go to the plaintiff and settle an action on such terms as he could obtain, and that if the plaintiff's attorney went on afterwards, he did so at the peril of paying costs himself."

This case, in effect, decided that facts, which *Wilkinson v. Byers* (1 Ad. & El. 106) had held to be sufficient to support an action of assumpsit, are sufficient also to support a plea.

In *Goodwin v. Cremer* (18 Q. B. 757) it was held that a plea, *puis darein continuance*, of payment in satisfaction and discharge, which was not pleaded in satisfaction of damages *and costs*, was bad on demurrer, and it would seem that if the plea had been pleaded in satisfaction of *the causes of action* in the declaration mentioned, it would have still been bad.

In *Cook v. Hopewell* (11 Ex. 555), decided in 1856, the defendant pleaded to the sum of £22 8s. 3d., the payment, after action brought, of £22 8s. 3d., which sum the plaintiff accepted in full satisfaction of the claim, and of all damages accrued in respect thereof. Upon this issue was joined. At the trial it appeared that the £22 8s. 3d. was paid and accepted, but no mention was made of costs, and it was held, after argument, that the costs not having been paid, the plea was not proved, and that the plaintiff was entitled to have the issue found in his favor, with nominal damages, and that the rule entitling the plaintiff to tax his costs, on his confessing a plea containing matter of defence after action brought, did not deprive him of the right of going down to trial if the plea was untrue.

But it is contended here that, since the Common Law Procedure Act, and the adoption of this rule, giving a plaintiff his costs up to plea pleaded, it is not now necessary that a plea of accord and satisfaction, *puis darein continuance*, should be applied to the *costs*, and that the doing so wrongfully deprives the plaintiff of the right to tax his costs under the rule ; but, even if it be no longer necessary so to plead by reason of the rule, still the rule cannot be construed as having the effect of depriving the plaintiff and defendant of the right to enter into such a contract in relation to costs as they may think fit, nor, if they should enter into such a contract, of depriving the defendant of the right to set it up in a plea, for the purpose of holding the plaintiff to the fulfilment of it, if he should proceed in evasion of it.

It is further contended that the plea upon its face shews that the accounting was in respect only of the demands *in*

the suit, irrespective of the costs of the suit, and that the sum of \$60 is stated to have been found due independently of the costs, and that thereupon it became a liquidated demand, and so that the allegation of the payment of \$60, in satisfaction of a liquidated demand for \$60, and of the further amount of costs, is bad as an averment of the payment of a part in satisfaction of the whole; but conceding it to be true, as I think it is, that the plea shews that the \$60 was found to be the amount due to the plaintiff, irrespective of costs, and although the note set out is not stated to have been negotiable, still, I think sufficient does appear to make the plea good within the principles of *Melville v. Carpenter* (11 U. C. 132); *Smith v. Page* (15 M. & W. 683); *Thame v. Boast* (12 Q. B. 408); *Callendar v. Howard*, (10 C. B. 290); *Cooper v. Parker* (15 C. B. 822); *Turner v. Collins* (15 Jur. 177), and other cases. I think that the settling these unliquidated cross demands, coupled with the abandonment by the defendant of the plea of the Statute of Limitations, and having regard to the uncertainty as to the plaintiff's claim for costs, if the case should proceed, and the reduction of an uncertain demand into a certain one, evidenced by a note payable at the short date of fifteen days, quite sufficient consideration in law to support a satisfaction of the costs as well as of the balance of \$60. In *Cooper v. Parker* it was held that payment of a smaller sum, coupled with an agreement to abandon the defence of infancy, was a good satisfaction of a greater sum, though liquidated. In *Turner v. Collins* it was held that, since the new rules dispensing with the plea of payment, where credits are given in particulars, the payment of a smaller sum might well be pleaded in satisfaction of a greater; the Court saying that they might notice that such particulars *might* have been given, and they might *assume* that they had been, and that the sum pleaded as payment was sufficient to cover the balance.

The inclination of the Courts in modern times is to let parties make their own contracts, and not to interpose any principle of law to set them aside to the prejudice of the

one who has fulfilled his part. The Courts will not weigh the value of the satisfaction pleaded, considering the parties themselves to be the best judges upon that point.

In some cases it has been said that if the satisfaction pleaded appears to be glaringly unreasonable, the Courts will hold it to be insufficient in law; but the more recent cases, I think, incline to the view that the parties themselves are the best judges of the reasonableness or unreasonableness of the settlement; but I can see nothing unreasonable in the settlement stated in this plea, for upon the authority of *Turner v. Collins* I think I may take notice that, having regard to the nature of the action and the amount admitted to be found to be the only balance due from the defendant to the plaintiff, it is not only possible but highly probable that, if the suit had proceeded to trial, the plaintiff would have recovered no more than inferior Court costs, against which the defendant might be allowed to tax superior Court costs; so that it may have been highly prudent in the plaintiff to accept a note for payment of the \$60, at the short date of fifteen days in full satisfaction not only of the account stated, but also of all claim he might be able to establish to costs. If it be true that the plaintiff did in fact accept the sum in full satisfaction of all costs, there can be no reason why he should get those costs paid over again upon taxation; and if it be not true, the plaintiff can join issue on the plea and carry the case down, if he thinks fit, and still recover all such costs as the nature of the demand and the amount found due may entitle him to, upon the authority of *Callander v. Howard* and of *Cook v. Hopewell*, which latter case is referred to with approval in *Howarth v. Brown* (1 H. & C. 694).

Judgment therefore will be against the demurrer.

Judgment for defendant on demurrer.

COONS V. ÆTNA INSURANCE COMPANY.

Marine insurance—Unseaworthiness—Evidence.

In the former report of this case (18 C. P. 305) the Court, though of opinion that defendants were entitled to a nonsuit, granted a new trial, suggesting whether, if evidence were given of defendants' knowledge of the age, build, and materials of which the vessel was built at the time of the insurance, it might not be held to modify the condition as to seaworthiness, so as to make it subordinate to the particular vessel being insured. On the new trial one H. was called by plaintiff, who proved that he, as defendant's agent, accepted the risk on the vessel in question; that he had seen but did not examine her, but judged her wholly from the registry, and insured her as B 1; that a B 1 vessel would be insured as readily as an A 1, the charge on freight being the same, and the seaworthiness would be expected to be the same, though the A 1 would not be so likely to go to pieces:

Held, that these facts did not bring the case within the principle laid down in *Burgess v. Wickham*, 3 B. & S. 669, and *Clapham v. Langton*, 34 L. J. Q. B. 46, and therefore *Held*, that the new evidence did not alter the position of the parties, and that a nonsuit had been again properly directed.

The pleadings are set out in the report of this case in 18 C. P. 305, on the motion to enter a nonsuit, on leave reserved, after the first trial. The judgment of this Court at page 311, says: "The issue was, whether the loss happened from unseaworthiness. The evidence shewed a case which, *primâ facie*, shewed unseaworthiness, and it was not explained or rebutted. The defendants were not obliged to prove it affirmatively in the absence of all evidence to make out a *primâ facie* case, and for this reason the defendants were entitled to a nonsuit."

"How far the insurers, knowing the age and build and materials of which the vessel was built at the time of the insurance, might be held to modify the condition as to seaworthiness, so as to make it subordinate to the particular vessel they were insuring, according to the principle of the cases in 34 L. J. Q. B. 46, and 10 Jurist N. S. 92, above mentioned, we are not called on to say, as no such view was presented at any time in the progress of the cause."

The plaintiff was allowed a new trial on payment of costs, and the case was again tried before Morrison, J., and a

nonsuit ordered. The question now was whether the case presented by plaintiff at the last trial brought him within the suggestions thrown out by the Court.

One Helliwell, called on the first trial, but not examined beyond the fact of his having taken the risk, proved that he was defendant's agent at St. Catharines and accepted the risk; that he had seen the tug, but did not examine her; that in the registry she was classed B 1, in 1866; that the lower the goods the higher the premium; that A 1 and A 2 would be higher; that the tug was insured at 6 per cent; that he could not say where she was at time of insurance; that there was no registry for 1867; that he did not think the Canadian registry worth much; did not look at it; that if she was A 2 the rate would be 5 or 6 per cent; that he knew her age from the registry; that she was entered as built in 1854; that he had insured her the previous year; that he knew she was a tug; that his only guide was the registry, and it was not his business to go to look at the vessel, nor to know anything about her, except the registry; that he saw her accidentally in the canal; that an A 1 vessel was newer and better than B 2; that on freights there was no difference of rate; that B 2 he would not insure at all; that a B 1 vessel they would insure as soon as A 1, as they would expect she would be as to seaworthiness the same, but that an A 1 would not be so likely to go to pieces when she went ashore or struck the ground.

As already stated, the learned Judge nonsuited the plaintiff.

Harrison, Q. C., obtained a rule to set aside the nonsuit, to which *Galt*, Q. C., and *Anderson* shewed cause, citing *Burgess v. Wyckham*, 10 Jur. N.S. 92; *Clapham v. Langton*, 34 L. J. Q. B. 46; *Marshall Ins.* 487; *Cullin v. Butler*, 5 M. & S. 461; 1 *Parke Ins.* 469.

Harrison, contra, cited *Thompson v. Hopper*, 6 M. & W. 172; *Clapham v. Langton*, 34 L. J. Q. B. 46; *Knill v. Hooper*, 2 H. & N. 277; *Lawrie v. Douglas*, 15 M. & W. 746; *Parker v. Potts*, 3 Dow, 23.

HAGARTY, C. J.. delivered the judgment of the Court.

A careful examination of the evidence, apart from Mr. Helliwell, discloses nothing to alter the state of facts on the first trial. The case was first tried before me and the evidence, as now taken, strikes me as weaker than before, apart from the testimony of Helliwell. I accept the judgment of this Court (differently constituted from the present Court), as to the general law on that question, and only propose to consider whether the new evidence alters the case.

The case chiefly referred to is *Burgess v. Wickham* (3 B. & S. 669). This was the case of a steamer of very light draft, built for plying on the Indus, and insured for the voyage out. The first count was in the ordinary form. The second count averred that the underwriters were informed, when they took the risk, of the purpose for which she was constructed, for river navigation only ; that a higher rate of premium was agreed upon in consequence, beyond the common rate for the insurance of a seaworthy vessel, and defendant contracted to insure her notwithstanding her build, &c. Unseaworthiness was pleaded. It was proved at the trial that the underwriters were so informed, and that the plaintiff would take all precautions to make her as fit for the ocean voyage as possible, and it was proved they did so. The jury were told by Sir A. Cockburn, C. J., that if no misrepresentation or concealment, it was a sufficient compliance with any warranty of seaworthiness, to be implied under the circumstances from the insurance, if she at the time of sailing had been made as seaworthy and as reasonably fit for the voyage as such a vessel could be made."

The jury found for plaintiff.

In giving judgment, on discharging a rule for a new trial for misdirection, the Chief Justice says : " The term seaworthiness is a relative flexible term, the degree of seaworthiness depending on the position in which the vessel may be placed, or on the nature of the navigation or adventure on which it is about to embark. It seems to me to follow,

that if an insurer agrees, with full knowledge of the facts, to insure a vessel, incapable from her size or construction of being brought up to the ordinary standard of seaworthiness, the implied warranty must be taken to be limited to the capacity of the vessel, and will be satisfied if she is made as seaworthy as she is capable of being made. * * If the parties are avowedly dealing with a vessel which no care or expense can bring up to the ordinary standard, and the owner does all that can be done to fit her for the voyage she has to encounter, of what has the insurer to complain? * * It may be objected that to admit evidence of extrinsic circumstances to qualify the ordinary warranty of seaworthiness, would be to admit parol evidence to control a written instrument; but it must be borne in mind that we are here dealing with a term not expressly contained in the contract, but implied in it upon the assumption of an intention in the parties not declared in the written instrument." Blackburn, J., who agreed in upholding the verdict, said in the course of an elaborate judgment: "The warranty of seaworthiness, implied by the general law of England in every voyage policy, is as much a part of that policy as if there were written in it 'warranted seaworthy.' I think that parol evidence can no more be admitted to contradict or qualify an implied warranty than it could have been if the warranty had been expressed."

Clapham v. Langton (34 L. J. N. S. Q. B. 46, 10 L. T. N. S. 875, in Error) affirmed the law as laid down in *Burgess v. Wickham*. Williams, J., adds: "We express no opinion upon the question, controverted by Blackburn, J., in that case, as to the admissibility of parol evidence to qualify a warranty in a written policy either expressed or implied."

It is to be observed that in the case before us it is not a question of implied warranty. The contract is express, that defendants do not insure against damages or injury arising from "rottenness, inherent defects and all other unseaworthiness."

There is no attempt here, either in the framing of the declaration or in the evidence, to shew any special contract with the underwriters for higher premium, in consequence of the peculiar state of the vessel, or any communication to them on the subject; on the contrary, the agent (Helliwell) says that he judged her wholly from the register, and insured her as B 1; that they would insure a B 1 vessel as readily as an A 1.; the charge on freight being the same, they would expect the seaworthiness to be the same; that the A 1 would not be so likely to go to pieces if stranded. Lord Eldon's language (in *Watson v. Clarke*, 1 Dow. 344) is often quoted: "When the inability of the ship to perform her voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage, and that the ship was not then seaworthy, and the *onus probandi* in such a case rested with the assured." Lord Redesdale followed to the same effect. See also 3 Dow. 24; 4 Dow. 276. *Hildyard's* Ed. of *Park* on Insurance, Vol. 1, 469, (1842)—"If a ship sail upon a voyage and in a day or two become leaky and founder, or is obliged to return to port without any storm or visible or adequate cause to produce such an effect, the presumption is that she was not seaworthy when she sailed, and the jury upon the plaintiff's own case may draw such a conclusion," citing *Munro v. Vandam*, Sittings before Lord Kenyon, at Guildhall, after Michaelmas, 1794.

1 *Arnould*. 690. (Ed. of 1857)—"Whether the assured were ignorant of the unseaworthiness of the ship or not makes no difference," citing Lord Eldon's judgment in *Douglas v. Scugall* (4 Dow. 276).

And as to the proper kind of evidence—1 *Arnould*, 727—"With regard to the means of proving that the ship was seaworthy or the reverse, the only satisfactory evidence is that of the persons who were employed to survey and examine the vessel. After this evidence has been given, however, experienced shipwrights, who never saw the ship, may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not."

Although nothing was urged in argument on this subject, we have not failed to notice that the cases cited are almost wholly on voyage policies, where there is always the implied warranty of seaworthiness at the commencement, so that the risk attaches. Here it is a time policy, in which there is no such implication, but the contract is express.

It may also be noticed that, although the vessel is called in the policy "a Tug," there is an express warranty that she shall be "employed exclusively in the freighting and passenger business." No question was raised on this, nor plea framed to meet it. It is only noticed in connection with some of the evidence as to the straining effect on a vessel while employed as a tug.

I am of opinion that the learned Judge, having the judgment of this Court before him, to the effect that the defendants were entitled to a nonsuit, and that the plaintiff was allowed to pay the costs and try his case again to bring it, if possible, within the principle of the cases cited, was right in holding that the new evidence did not alter the position of the parties.

As already intimated, I do not further enter into a discussion of the case.

Rule discharged

PARKYN V. STAPLES.

Arrest by magistrate—Notice of action—Omission of time and place—Insufficiency.

In an action against defendant, a Justice of the Peace, for the arrest and imprisonment of plaintiff, the notice of action stated that defendant assaulted plaintiff, imprisoned and kept him in prison for a long time, to wit, four days, and caused him to be illegally arrested, and gave him into the custody of a constable, and illegally committed and sent him in such custody to the jail at the town of Lindsay, and caused him to be there confined for a long time :

Held, insufficient, as omitting to state where and when the assault took place, and the evidence not being confined to the imprisonment at Lindsay.

Tresspass for assaulting plaintiff, imprisoning him for

four days, and causing him to be illegally arrested, and charging that defendant gave him into custody of a constable and illegally committed and sent him in custody to the gaol at the town of Lindsay, and caused him to be there confined, &c.

Plea, not guilty, by statute.

At the trial, at Lindsay, before Smith, County Judge, evidence was given of plaintiff's arrest on defendant's warrant, as a J. P., in the township of Laxton, his examination there, and commitment to Lindsay gaol, on a charge intended to be one for attempting to poison cattle, and of his discharge on proclamation at the Quarter Sessions, no charge having been preferred.

The notice of action after the preliminary matter proceeded thus: "For that you, the said Robert Staples, assaulted the said Charles Parkyn" and imprisoned him and kept him in prison for a long time, to wit, for four days, and caused him to be illegally arrested, and gave him into the custody of a constable, and illegally committed and sent him in such custody to the gaol at the town of Lindsay, and caused him to be there confined for a long time, whereby, &c."

It was objected at the trial that this notice was insufficient, in not stating any place where assault was charged, &c., nor when the same took place, besides other objections, on all of which leave was reserved to move to enter nonsuit, and plaintiff had a verdict.

S. Smith, Q. C., obtained a rule on the leave reserved, to which *Hector Cameron* shewed cause, citing *Taylor v. Nessfield*, 3 E. & B. 724; *Martin v. Upcher*, 3 Q. B. 661; *Friel v. Ferguson*, 15 C. P. 584; *Jones v. Bird*, 5 B. & Al. 837; *Prickett v. Gratreux*, 8 Q. B. 1020; *Jacklin v. Fytche*, 14 M. & W. 381; *Jones v. Nicholls*, 13 Q. B. 361; *Breese v. Jerdine*, 4 Q. B. 585; *Neil v. McMillan*, 25 U. C. 485; *Moran v. Palmer*, 13 C. P. 450, 528; *Moffatt v. Barnard*, 24 U. C. 498; *Dickson v. Crabbe*, 24 U. C. 494.

A. N. Richards, contra, cited *Oliphant v. Leslie*, 24 U. C. 398.

HAGARTY, C. J., delivered the judgment of the Court.

We must first consider the objection to the notice.

If we follow the case of *Madden v. Shewer* (2 U. C. 115), decided Easter, 8 & 9 Vic., we must hold this notice insufficient. There the notice was, that on or about 3rd September, 1844, the defendant caused plaintiff to be arrested and imprisoned by one J. W., a constable, acting under defendant's orders, &c., and kept and detained him a prisoner about six hours; and also for that the said J. W., acting as aforesaid, then and there assaulted, beat, &c., the plaintiff, as such prisoner; and also for that the said J. W., acting as aforesaid, did other wrongs then and there to plaintiff; and also that defendant, on the said 3rd September, or thereabout, did assault, &c., and imprison plaintiff about six hours, and carried him to a certain dwelling house in the township of Ernestown, four miles distant from the place where he was so arrested, and other wrongs, &c.

The late Sir J. Robinson, delivering judgment, says: "With respect to the first trespass, in assaulting and seizing the party, no place is stated. The two acts have not necessarily any close connection as regards locality; and for all that appears the former act may have been out of the district altogether and out of the defendant's jurisdiction; and that may be the very ground of the action. We may notice judicially that the township of Ernestown is in the Midland district, &c.; but we cannot know judicially in what district any place said to be four miles from it may be situate. When once it is settled that the notice must give explicit information of the place where, &c., then we must see that this condition is reasonably complied with, and not allowed to be frittered away by ingenious construction."

On the argument *Martin v. Upcher* (3 Q. B. 662) and *Breese v. Jerdine* (4 Q. B. 585) were noticed.

In *Cronkhite v. Somerville* (3 U. C. 131) the same principle is upheld. The notice spoke of an assault, &c., in Whitby, and also an assault and imprisonment for six days in Pickering. The evidence shewed an arrest in Pickering

and committal in Whitby to the Toronto gaol for six days. It was held that the Toronto imprisonment could not be given in evidence, and, following *Madden v. Shewer*, that "it is indispensable to state in such notice the place where the injury was committed," and that it must follow that the place should be correctly stated. In the Reporter's note the case of *Jacklin v. Fytche* (14 M. & W. 381) is cited, but it is not noticed otherwise.

In that case we find a disposition to relax the strictness as to statement. The notice was, "for that you, on 10th May, &c., with force and arms, caused an assault to be made upon me, and then caused me to be beaten, laid hold of, &c., and forced and compelled to go into along and through divers public streets and roads to a certain prison, sc. at Louth, &c., and to be imprisoned there," &c. It was objected that there was no place named with respect to the assault and original imprisonment, relying on *Martin v. Upcher* and *Breese v. Jerdine*. To meet the objection the evidence at the trial was confined to the imprisonment at Louth. Parke, B., says, "According to *Martin v. Upcher*, the first part of the trespass is not described with convenient certainty, but the imprisonment at Louth is."

Rolfe, B.: "Here I should say that it is the description of one continued act, concluding with the imprisonment at Louth. I doubt very much, therefore, whether even that (the former) part of the statement is not sufficient."

Parke, B.: "I am very much disposed to concur with my brother Rolfe in that opinion, but it is not necessary to decide that, because the evidence was confined to the imprisonment at Louth."

In *Leary v. Patrick* (15 Q.B. 266) the notice was, "for that the defendant, in the parish of St. Nicholas, in the borough of Harwich, on the 1st day of August, 1848, caused him to be imprisoned, and also for that they, on the said 1st August, 1848, caused his goods to be seized," &c.

This was objected to on the argument. Lord Campbell says, "It is clear that the justices must, in making this notice, have known where the causes of action all arose. It

cannot be necessary to have a specific *venue* laid to every traversable fact in a notice of action."

Patteson, J.: "The notice is good, as there is a place mentioned in it fairly applicable to every fact."

Wightman, J.: "In *Martin v. Upcher* no place whatever was mentioned: the present case is distinguishable, for here a place was mentioned, which is reasonably applicable to all the trespasses."

If we uphold the notice in the case before us, we shall carry the relaxation a step further. This notice says that defendant assaulted plaintiff "and imprisoned him and kept him in prison for a long time, sc. for four days," stating no place: it then proceeds, "and caused him to be illegally arrested, and gave him into the custody of a constable, and illegally committed him and sent him in such custody to the gaol at the town of Lindsay, and caused him to be there confined for a long time."

An arrest and imprisonment for four days is stated without *venue* or statement of time, before the statement of arresting and giving him in custody to a constable and the commitment to the Lindsay gaol.

Assuming that the doubt expressed by Rolfe and Parke, BB., to be good law, can we say that this whole statement falls within the description of the matter in that case, that "it is the description of one continuous act, concluding with the imprisonment at Louth?" There the notice was that defendant caused an assault to be made on plaintiff, and then caused him to be beaten, laid hold of, &c., and forced and compelled him to go in through and along divers public streets and roads to a certain prison sc. at Louth.

Again, adopting the law as laid down in *Learey v. Patrick*, is there a place stated fairly applicable to every fact? There it was held sufficient to state the place of the trespass to the person on a named day, and that also on the same day the defendant caused his goods to be seized. The place or *venue* first stated is held to apply to the other trespass on the same named day.

No time whatever is stated in the notice before us. In

all the cases cited we find a time mentioned at which this trespass was said to have been committed, and we think there the allegation of time materially helped the rest of the notice, so as to make it sufficiently clear and explicit. *Martin v. Upcher* is very clear on this point. Lord Denman says, "I do not go so far as to say that a party will always be strictly bound to prove the time and place which he names in his notice; but I think the words of the statute require that a time and place for the occurrence be named;" and in *Jacklin v. Fytche*, the case most in favour of plaintiff, Alderson, B., says, "The plaintiff is not bound to tell the defendants more than that they unlawfully imprisoned him, and when and where they did so."

We think the notice was insufficient, and that the rule must be absolute to enter nonsuit.

Rule absolute to enter nonsuit.

THE EMPIRE GOLD MINING COMPANY V. JONES.

Sale of lands—Equity of redemption—Covenant against incumbrances—Substantial damages—Measure of damage.

A covenant against incumbrances in a deed of bargain and sale purporting to convey the legal fee simple runs with the land, although the grantor was in fact seised only of an equity of redemption, and can be sued upon as such by the grantee, who will be entitled to substantial and not merely nominal damages; and the measure of damage will be the difference between the value of the equity of redemption and the indefeasible estate of inheritance contracted and paid for, that difference being represented by the amount for which the mortgage stands as a security.

By an indenture bearing date the 15th January, 1868, after reciting that William Milton Jones and Peter D. Conger proposed forming themselves and others into a Company, for the purposes of mining upon the lands in the indenture mentioned, and had contracted and agreed with the defendant for the absolute purchase in fee simple of the said lands for the price or sum of \$10,000 (the land

to be conveyed to the Company so soon as the same should be legally organized), he, defendant, in consideration of the said sum of \$10,000, then paid to him by Jones and Conger, and acknowledged in the deed, granted, bargained, and sold to said Jones and Conger, their heirs and assigns, certain lands in the indenture particularly mentioned, to have and to hold the same to them, their heirs and assigns, upon trust, immediately upon the formation of the said Company, and on its ability and power to receive a conveyance, to convey and assure the same to such Company in fee simple. By that indenture, defendant, for himself, his heirs, &c., covenanted with the grantees, their heirs and assigns, that notwithstanding anything by the defendant done, or knowingly suffered, he, said defendant, then had power to grant, bargain and sell all the said premises to the use of the said grantees, their heirs and assigns, free from incumbrances; and also for quiet enjoyment; and for further assurance.

The Company, having been duly organized and empowered to hold lands in fee, under the name of "The Empire Gold Mining Company of Madoc," Jones and Conger, by indenture of bargain and sale, bearing date 10th February, 1868, granted, bargained and sold same lands to said Company, their successors and assigns, forever. In virtue of this deed the Company proceeded to carry on their operations.

The Company subsequently discovered that, by an indenture of mortgage, bearing date 2nd August, 1867, defendant had already granted same lands to one George Moffatt in fee, subject to a proviso for redemption upon payment of the sum of \$4,000, &c., &c.

The Company accordingly, upon 10th September, 1868, commenced this action and declared upon defendant's covenant above set out, contained in the deed to Jones and Conger, that defendant had power to convey free from incumbrances, the plaintiffs claiming, by virtue of the indenture of 10th February, as assignees in fee of the estate conveyed to Jones and Conger by the indenture of

the 25th January. The defendant pleaded *non est factum*, and further, that at the time of the execution of said indenture of 25th January, the premises were free from incumbrances according to the true intent and meaning of defendant's covenant in that behalf.

Issue was joined thereon, and the case went down for trial at the last Fall Assizes, at Belleville, before Hagarty, C. J.

At the trial the above several indentures were proved, and it was also proved that defendant had paid to the mortgagee the first instalment due with all interest; and it further appeared that the subsequent instalments had not become payable when the action was brought. *Diamond* thereupon moved a nonsuit, upon the grounds that, as he contended, plaintiffs could be entitled to no damages until default should be committed in payment of the instalments, and that, as the defendant had only in fact an equity of redemption when he executed the indenture of 25th January, the covenant in that deed did not run with the land, so as to give the plaintiffs the benefit thereof, in virtue of the indenture of the 10th February. A verdict was rendered for the plaintiffs for \$3,210, and leave was reserved to defendant to move to reduce the damages to nominal damages, or to enter a nonsuit.

A rule was accordingly obtained in Michaelmas Term, to which *Wallbridge*, Q.C., shewed cause, citing *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Carlisle v. Orde*, 7 C. P. 456; *Connell v. Boulton*, 25 U. C. 444; *Kennedy v. Solomon*, 14 U. C. 623; *Gamble v. Rees*, 6 U. C. 397.

Diamond, contra.

Two questions arise in this case. 1st. As to the measure of damages. 2nd. That the estate being an equitable one, the covenant does not run with it. For the principles on which damages are awarded, see Sedgwick, p. 57, which shews that the law does not aim at complete compensation. Mayne, in citing *Hadly v. Baxendale*, lays it down that a party is only held responsible for such consequences

as may reasonably be supposed to have been contemplated. These principles govern the cases on this subject: *Lethbridge v. Mytton*, 2 B. & Ad. 772, and *Carr v. Roberts*, 5 B. & Ad. 78, governing *Connell v. Boulton*, 25 U. C. 444. In *Connell v. Boulton*, *Carlyle v. Ince*, 7 C. P. 456, and *Raymond v. Cooper*, 8 C. P. 388, &c., the money was past due and the action was maintainable on two grounds: 1st. The meaning of the covenant was broken; 2nd. Because a demand in law had been made, as stated by *Platt* p. 331, and *Kennedy v. Solomon*, 630, to be one of the three, alternative necessities to support action. *Connell v. Boulton* is the most direct authority for defendants. There the covenant was that the defendant had done no act to encumber; but here the money was past due, and the Court, strongly impressed with the equities of the plaintiff's case, could only support their judgment by *Mytton v. Lethbridge* and holding the covenant equivalent to a covenant to pay off, or, as it is put in *Graham v. Baker*, as a covenant of indemnity. The judgment in *Graham v. Baker*, 10 C. P. 426, and authorities there cited, prove that a covenant to run with the land must be treated as a covenant of indemnity; otherwise, being broken so soon as made, it would not run with land.

The action in *Connell v. Boulton* being between the original parties, this question does not arise.

2nd. What difference in principle is there between a covenant for title and a covenant against encumbrances? If any, it should be in favor of that for title, and the law is well settled that until eviction or actual loss only nominal damages can be recovered: *Graham v. Baker*, 10 C. P. 426; *Snider v. Snider*, 13 C. P. 156.

3rd. *Construction of Covenants.*—*Platt* on Covts. p. 136. Covenants are to be expounded so as to carry into effect the intent to be collected from the whole. Applying this rule to this case, how is the covenant to be construed? If as one covenant, then it is the usual covenant against incumbrances, the form of which is given in *Platt* and in *Rawle*, p. 109. That it is a covenant of indemnity, was it not

the interest of the parties to enter into this covenant? If so, *Kennedy v. Solomon* and *Graham v. Baker* govern the case for plaintiff. But if double in form, how is the first clause to be viewed? As a covenant for title; and for this there is some reason, being worded very similar to form in *Rawle*, 107, *Platt*, 310. If so, *Graham v. Baker* settles this case. If as a covenant against incumbrance, same as in *Connell v. Boulton*, then *Graham v. Baker* shews that to make it available to assignees it must be treated as a covenant of indemnity, and then *Kennedy v. Solomon* governs the case; so that this Court must, if they hold substantial damages recoverable, ignore *Graham v. Baker* and the English authorities, holding the covenant as one of indemnity, to enable the assignee to have the benefit of it. If as an absolute covenant, they hold with the American authorities, then the covenant being broken when made does not follow. Plaintiff so construes the covenant (i. e., as one of indemnity), otherwise, on the authorities, he cannot recover at all. There is then no authority in favor of substantial damages, and there are the following direct authorities against it: *Vane v. Lord Barnard*, Gilbert Eq. Rep. 7; *Platt* Cov. 312; *Rawle*, Cov. 134; *Kennedy v. Solomon*, 14 U. C. 623; *Graham v. Baker*, 10 C. P. 426; *Snider v. Snider*, 13 C. P. 156.

As to 2nd question, that the covenant would not run with land, because only equitable estate conveyed, see *Rawle*, 360; *Platt*, 461; *Mayor of Carlisle v. Blanim*, 8 East, 487; *Webb v. Russell*, 3 Term Reports, 393; *Stokes v. Russell*, 3 T. R. 678.

GWYNNE, J.*—As to the point that the plaintiff cannot sue upon this covenant, as upon a covenant running with the land, for the reason that, as now appears, the covenantor had only an equity of redemption in the land, the case must be governed by *Gamble v. Rees* (6 U. C. 401) and *Kingdon v. Nottle* (4 M. & Sel. 53). These cases decide

* The Chief Justice and Adam Wilson, J., having been absent on official business during the argument, took no part in the judgment.

that the benefit of covenants for title contained in a deed, adequate to convey, and purporting to convey, a legal estate in lands, will run to the assignee of the estate so purported to be conveyed, although the grantor had in fact no estate in the lands, or had not the estate which he professed to grant. The covenant is annexed to the seisin, which the deed professes to convey, and not to the title, if any, which the grantor had. It was argued that the benefit of covenants running with the land passes with the legal estate to a mortgagee, and that the mortgagor, having only an equity of redemption, cannot, nor can his assignee, maintain an action upon them. That is undoubtedly so, and the principle affects all the covenants annexed to the estate prior to the execution of the mortgage, but cannot affect a case where the vendor, after the execution of the mortgage, ignoring the mortgage, executes a deed adequate to convey and purporting to convey the legal estate in fee. The cases of *Webb v. Russell* (3 T. R. 393), *Stokes v. Russell* (3 T. R. 681) and *Russell v. Stokes* in Error (1 H. Bl. 562), were referred to, but they do not affect this case. What these cases decide is, that where a mortgagor and mortgagee join in executing a lease, it takes effect as the lease of the mortgagee, who has the legal estate, and that a covenant for payment of the rent having been entered into with the mortgagor, who on the conveyance appeared to have only an equity of redemption, that was a covenant *in gross*, which could never become annexed to the estate of the assignees of the mortgagee, notwithstanding a conveyance of the equity of redemption by the mortgagor to such assignees, because, to entitle an assignee to sue, it is necessary that he should be in of the same estate as the original covenantee was; and the covenant having been *in gross* in its inception never could become annexed to the estate in the lands: Notes to Spencer's case (1 *Smith Leading Cases* 62). The principle of the *The Mayor of Carlisle v. Blamire* (8 East, 487) is to the like effect. There it was held that a covenant, entered into by the owner of the legal fee, could not be

enforced against persons seised of the equitable fee in the same lands at the time the covenant was broken. All these and the like cases are beside the question here, for the same estate which the deed, which contains the covenant, purported to convey, is transferred to the plaintiffs, so that the supposed defect in the plaintiffs' right to sue does not exist.

Then, upon the question of damages, *Hackett v. Boulton* (3 C. P. 407) is an express authority that substantial damages are recoverable. *Carlisle v. Orde* (7 C. P. 456), although there was a bond of indemnity sued upon as well as a covenant, shews, I think, the opinion of Draper, C. J., to have been, that substantial damages are recoverable upon the covenant under the circumstances appearing here. The only difference between *Connell v. Boulton* (25 U. C. 444) and this case is, that there the mortgage was due. It is an authority also that substantial damages are recoverable. *Raymond v. Cooper* (8 C. P. 388) and *Carr v. Roberts* (5 B. & Ad. 78) were cases of bonds of indemnity. *Lethbridge v. Mytton* (2 B. & Ad. 772) was a case of a covenant of indemnity, and to pay off a mortgage within a year. Ten years elapsed without its having been paid, and although the mortgage never was enforced, on an action being brought on the covenant the covenantee was held entitled to recover the full amount of the mortgage, although no damage whatever, further than what consisted in its existence, had been sustained by him.

In *Graham v. Baker* (10 C. P. 426) and *Snider v. Snider* (13 C. P. 156) the breaches consisted in a simple naked negation of title, and the parties had possession, and no damage by reason of the existence of any incumbrance was stated or suggested. It was treated that the defect of title might have been cured by the lapse of time; so that these cases can not affect the present.

There are, however, observations in *Kennedy v. Solomon* (14 U. C. at p. 628) in the judgment of the late Chief Justice Sir John Robinson, which give some countenance to the contention of the defendant, that nominal damages

only are recoverable here. The observations alluded to are not upon a point upon which the judgment was given, for the judgment was upon the covenant for quiet enjoyment : they related to the covenants for seisin and for good title. There is also a difference between the covenant for right to convey there and here ; for here the covenant is specially directed to a right to convey free from incumbrance, so as to assimilate it to a covenant that the premises are free from incumbrances. Moreover, the learned Chief Justice does not express a decided opinion, but a doubt only. Any doubt, however, or any opinion of that learned Judge, even though upon a collateral point, or though wholly extrajudicial, is entitled to the greatest weight, and it is with the most profound deference to his opinion that I have felt called upon to consider in this case whether the authority, to which the learned Chief Justice refers, justifies his doubt. He says, " A mortgage or payment is treated in equity not as a matter affecting the title or right to convey, because they hold that the mortgagor or the judgment debtor is nevertheless the owner of the estate and entitled to convey, subject of course to the incumbrance." In *Townsend v. Champernown* (1 Y. & J. 449) the Court said that, in practice, in the Master's office, a mortgage, even though it may be to secure a sum larger than the value of the property, is always treated and considered as a matter of conveyance and not of objection to the title, and I find no authority for holding that it is otherwise regarded at law, though I do not feel confident that when a mortgage in fee has been given by the vendor, before giving the conveyance in which he covenants for title, and where the mortgage money has not been paid, an action might not lie on the covenant for title and nominal damages be recovered, though the vendee had never been molested by any claim under the mortgage while it was unsatisfied."

Now, on a bill for specific performance in equity, the reference to the Master is to enquire and report whether a good title *can be* made, and when first shewn. It is shewn by an abstract, which must shew all the incumbrances; and

the abstract is held to be complete and a good title shewn whenever it appears that, *upon certain acts being done*, the legal and equitable estates will be in the purchaser; consequently, the appearance of incumbrances on the abstract is no reason why the Master should report that a good title *cannot be made*; nor do they afford sufficient grounds of exception to his report that a good title *can be made*; for, the Court being in possession of what the incumbrances are, before the conveyances come to be made, can and does cause them to be removed and gives the purchaser ample protection against them. This is the extent of the rule in equity, and the like rule prevails at law in executory contracts, where the contract points to the shewing the title and not to the perfecting it in the purchaser by conveyance: *Savory v. Underwood* (23 L. T. Q. B. 141); but the rule, I apprehend, does not, and indeed cannot have any application to executed contracts. The Court of Chancery treats the mortgage as an incumbrance and causes it to be removed, or makes ample provision for the protection of the purchaser against it; acting upon the principle that the Court will not, (in as much as everything which it does is done with a view to perfection), cause conveyances to be executed containing a covenant, which, when executed, would, *eo instanti*, give to the purchaser an action at law to recover damages in respect of these same incumbrances. True it is that in equity the mortgagor is in a sense deemed to be the owner of the estate and the mortgage only a pledge and an incumbrance. Treating it as an incumbrance presently existing is sufficient for the purpose of this action; but it is to be added, that at law the mortgagee in fee is regarded in quite a different light. He is *seised* of the estate, and that being so, the mortgagor *cannot* be. When he then assumes to convey in fee simple absolute, and covenants for seisin or for good title simply, the rule prevailing in equity, upon references to the Master on bills for specific performance, can furnish no rule for fixing the measure of damages sustained by reason of the breach of that covenant, short of the protection given by the Court of Chancery

itself, when the conveyances come to be executed; namely, full protection and indemnity against the incumbrances.

In *Howell v. Richards* (11 East, 642) Lord Ellenborough says, "The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz., in this case, an indefeasible estate in fee simple." Now, if he executes a deed purporting to convey such an estate, when he in fact has only an equity of redemption, the legal estate being in a mortgagee in fee, and covenants that he has such an estate, how can it be said that this covenant is not *substantially* broken? and if *substantially* broken, that is, not merely technically, but in substance, how can it be said that the purchaser should be restricted to the recovery of nominal damages only?

Vane v. Lord Barnard (Gillb. Eq. Rep. 7), before Lord Chancellor Cowper, has been referred to, but that, in my judgment, rightly understood, is a strong case in support of the recovery of substantial damages in this case.

Lord Barnard, on the marriage of his son, entered into articles with trustees, whereby he covenanted to settle certain lands to the usual limitations of marriage settlements, and he covenanted "that in such settlement there shall be covenants that he is seised in fee, has good right to convey, and that the trustees shall enjoy free from incumbrances."

It happened that these lands were charged by Lord Barnard's own marriage settlement with £6,500, to be paid to such "*daughter or daughters as should be living at his death and not provided for*." A bill was filed against Lord Barnard for a specific performance of the covenant in his son's articles, by Lord Barnard's paying off or otherwise giving collateral security against the contingent portion of £6,500. All parties had notice of this charge when Lord Barnard's covenant was given. The Lord Chancellor refused this relief, saying:—"Lord Barnard has not covenanted that the lands are free from incumbrances, but only that

in the settlement he would give specific covenants. Notice or no notice was very material in this case; for where a covenant is in this manner, if any incumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, *that incumbrance shall be discharged* even before the sealing of the deed of settlement, because it would be needless to enter into a covenant, which, before entering into, is already known to be broken. Now, when you have notice of an incumbrance before executing the articles, you consent with your eyes open to accept the party's covenant against incumbrances you were aware of; and when you have chosen your own security this Court will give no other security than by the articles is agreed to, and the rather in this case, *for that the portion is not a certain incumbrance, but a contingent one.*"

"It was strongly urged by Mr. Vernon that, supposing these articles were but a covenant *to covenant*, yet, as soon as the articles were performed by sealing the deed of settlement, then they might the next day file a bill to enforce specific performance of the covenant." The Lord Chancellor said, in this case, they could not, *"for the incumbrance was not necessary, but contingent,* and if you brought an action at law upon such a covenant you could not recover twopence until *breach*, which possibly *may never happen*; so relief was refused against this contingent covenant, but was granted in respect of another charge, which was present and not contingent."

The Reporter adds: "It seems, the portion being *contingent* and *not certain* was the reason of this part of the decree, because it is plain by the latter part of the decree, where the incumbrance was certain, viz., the payment of a yearly sum, and Lord Barnard was decreed immediately to discharge it, though by the articles he did but covenant *to covenant*;" and the report concludes: "Note the difference between a present covenant, that lands are free from incumbrance and that a man shall execute a deed with covenant that the lands are free, and between a covenant

that lands are free and that the trustees shall enjoy the lands free."

The portion in this case, it is to be observed, in respect of which the relief was refused, and to which the Lord Chancellor referred, when he said an action at law would not lie, was not a present incumbrance: it had nothing of the character of a "*debitum in presenti solvendum in futuro*:" it depended upon two contingencies whether it ever would become an incumbrance; namely, Lord Barnard leaving a daughter him surviving, and her not being provided for. The contingency referred to was not whether, admitting the charge to be a present incumbrance, it might or not ever be enforced to the damage of the covenantee, but whether it ever should become a present incumbrance. That this was the view of the Lord Chancellor is apparent from his decreeing indemnity against the charge which was payable annually, and which was not therefore as yet payable, although by possibility it might never be enforced to the damage of the covenantee. That was a present incumbrance, a "*debitum in presenti solvendum in futuro*," and therefore it was decreed to be discharged. The portion, on the contrary, was somewhat of the character of an inchoate right to dower, which is not a present charge on the estate, and for which no action lies. Here the mortgage is a present incumbrance and the covenant is a present covenant, so that *Vane v. Lord Barnard* is an authority that substantial damages are recoverable here. But the case of *Lock v. Furze* (19 C. B. N. S. 118, and in the Exchequer Chamber, L. Rep. C. P. 441), conclusively places the principle for estimating the measure of damages upon a sound, firm and rational basis, namely, that there is no difference in this respect between a contract entered into on the sale of real property and on the sale of a chattel. The true measure of damages in both cases is the difference between the value of the thing as it is and as it was warranted to be. The old case of *Gray v. Briscoe* (Noy. 142) is reaffirmed, where the covenant was that the covenantor was seised of Blackacre in fee simple, when in

truth it was copyhold land. The Court held the covenant to be broken and that the plaintiff should recover damages according to the rate that the country values fee simple and more than copyhold. The rule as now settled by *Lock v. Furze*, after a review of all the cases, I take to be this that, as affecting contracts relating to realty, in the case of executory contracts, upon the vendor failing to establish a good title, the vendee shall recover his deposit, if any, and interest, and such reasonable expenses as he has incurred in investigating the title; and in case he has entered into possession, in pursuance of the contract, then perhaps such further sum as he may have reasonably expended on the property in the expectation of the contract being fulfilled.

In case the contract has been executed, but no title has passed at all, then, on a covenant for seisin or good right to convey, he shall recover back his principal and interest and expenses; but in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that estate, which has passed, and that which the deed purported to convey, and which the grantor covenanted he had a right to convey.

Now, to apply this rule to the present case.

The deed purported to convey an indefeasible estate of inheritance in fee simple, free from incumbrances, done or knowingly suffered by the grantor. All that the grantees have in truth obtained is an equity of redemption, which is subject to a mortgage, which constitutes a present incumbrance, although the moneys secured thereby are payable at future periods. The covenant is broken: the plaintiffs, therefore, have a right to recover in damages the difference between the value of the equity of redemption, which they have got, and the indefeasible estate of inheritance, which they contracted for and paid for. That difference is represented by the amount for which the mortgage stands as a security and neither more or less.

A case might no doubt arise, as where the amount secured by the mortgage is made payable at a remote period,

and either without interest or at a low rate of interest, in which it might be necessary to make a deduction equivalent to the difference between the value of a present payment of the principal and payment at the deferred period; but in this case there arises no question of that kind. I am of opinion, therefore, that the damages have been assessed upon the proper principle, and that the *postea* must be given to the plaintiffs.

Rule discharged.

ONTARIO BANK V. NEWTON.

Warehouse receipts.

Where two partners, not carrying on the business of warehousemen, have their partnership stock in their own cellar, a receipt given by one to the other for that stock, though in the form of a warehouse receipt, is not a warehouse receipt within the meaning of the Statute (ch. 54 Consolidated Statutes of Canada).

This was an action for the conversion by the defendant of the plaintiff's goods, namely, 166 barrels of refined oil.

The defendant pleaded, 1. Not guilty. 2. Oil not property of plaintiffs, as alleged. 3. A plea of fraudulent preference within the Insolvent Act, upon which, however, nothing turned on the argument of the rule.

Issue being joined the case went down for trial before the present Chief Justice of this Court, at Toronto, in January, 1868. At the trial the Manager of the plaintiffs bank at Guelph was called as a witness for the plaintiffs, and stated that on the 31st December, 1866, he took a warehouse receipt of that date for 116 barrels, made by one Samuel Hockin to his father, William Hockin's order, and endorsed by William Hockin to the Bank. He said that this order was overdrawn; but what was meant by this expression did not clearly appear. He said that on the strength of this receipt he accepted and cashed certain cheques of William Hockin's, and that on the 12th January, 1867,

he discounted for him a note, dated the 2nd January, 1867. The note and receipt with another document, set out below, were produced by the witness, and filed at the trial. He also produced another receipt, dated 4th January, 1867, for 50 barrels, also made by Samuel Hockin to William's order, and by William endorsed to the Bank, upon the security of which a note for \$420 was then discounted by the Bank. The documents relating to this transaction were also produced by the witness and filed.

The documents so produced in relation to both transactions were as follows :—

1st. Relating to the note discounted on 12th January. "Guelph, December 31st, 1866. Memorandum—Oil stored for Ontario Bank by W. Hockin: 116 barrels, containing 4872 gallons, at 20 cents=\$974.40."

2nd. "Guelph, 31st December, 1866, Received in cellar from William Hockin one hundred and sixteen barrels refined oil, which I agree to hold subject to his order, to be delivered pursuant to his endorsement on this receipt. This is to be regarded as a receipt under the provisions of Statute 22 Vic. ch. 20, being 22 Vic. ch. 54 of the Consolidated Statutes of Canada and the amended Statute 24 Vic. ch. 23.

SAML. HOCKIN."

The receipt was endorsed as follows :

"Deliver to the Ontario Bank or order. WM. HOCKIN."

3rd. A promissory note, dated January 2nd, 1867, for \$974.40, made by Wm. Hockin, payable to the order of Samuel Hockin, one month after date, at the Ontario Bank.

As to the note for \$420.

1st. "Guelph, January 3rd, 1866, (which should be 1867). "Memorandum of 50 barrels of oil stored by Wm. Hockin for Ontario Bank. 2100 gals. at 20 cents = \$420."

2nd. "Guelph, 4th January, 1867, Received in cellar from William Hockin fifty barrels of refined coal oil, containing 2100 gallons." The residue of the receipt was similar to the former one, and was signed, "SAML. HOCKIN."

This was endorsed in blank thus, "Wm. Hockin."

3rd. A promissory note, dated January 4th, 1867, made by William Hockin for \$420, payable to the order of S. Hockin, one month after date, at the Ontario Bank, and endorsed by S. Hockin.

At the time this last receipt was given some of the oil mentioned in it was in *tanks* at the refinery of William and Samuel Hockin, who carried on the business of oil refiners in partnership, to which business William added that of a cooper. All the oil mentioned in both receipts was the joint property of William and Samuel, and was in their own possession at the refinery where they carried on the business of refining oil. They were not warehousemen, nor did witness ever hear of their storing oil for any other person; but they put their oil, as they refined it, into their cellar at the refinery, until they had an opportunity of selling it. Before the above notes matured, and on, as it would seem, the 18th January, 1867, William and Samuel executed an assignment in Insolvency, under the Insolvent Act, to the defendant, an official assignee, who thereunder took possession of the oil. Plaintiffs' Manager demanded of him the oil, shewing him the above receipts, but he, acting for the creditors, refused to give it up.

Under these circumstances the Chief Justice nonsuited the plaintiffs, holding that this was not a transaction coming within and protected by the warehouse receipt clauses of the Act respecting Incorporated Banks and the Act in amendment thereof.

In Hilary Term, 1868, *C. S. Paterson* obtained a rule to shew cause why the nonsuit should not be set aside and a new trial had, upon the grounds that the warehouse receipts in question were sufficient, under the statutes in that behalf, to vest the property in the plaintiffs.

In Michaelmas Term, last, *Hodgins* shewed cause, and cited *C. S. C. ch. 54, s. 8*; *Glass v. Whitney*, 22 U. C. 290; *Hunter v. Borst*, 13 U. C. 141; 1 Sm. L. C. 182, 183, 204, last ed.

C. S. Paterson supported the rule, citing *Townley v. Crump*, 4 A. & E. 58; *Harman v. Anderson*, 2 Camp. 243; *Pearson v. Dawson*, E. B. & E. 448, and contending that the law was a beneficial one, and that full effect should be given to its provisions; that the term "warehousemen" in the Statute, 22 Vic. ch. 54, was a person who, being entrusted with the property, being merchandize, of another, stores it for that other, and that such a person was different from the person referred to in 24 Vic. ch. 23, which used the terms "any person engaged in the calling of warehouseman," and that 31 Vic. ch. 11, secs. 7 & 9, preserved this distinction; and, finally, that any bailee of goods, holding them for another, was a "warehouseman" within the Act, and so that this property, which was the joint property of the father and son, became by the receipt the separate property of the father in the hands of the son, as "warehouseman," and that for this purpose it was not necessary that he should have been "engaged in the calling of warehouseman."

GWYNNE, J.*—I confess that I am unable to appreciate the force of Mr. Paterson's argument. That the Legislature, by the use of the words in 24 Vic. ch. 23, "provided that where any person engaged in the calling of a warehouseman," &c., &c., did not mean any different person from the person designated "warehouseman" in the prior Act, is, I think, apparent not only from the fact that the amending Act is introduced as a proviso to the clauses in the original Act relating to warehousemen and made part of that Act, but from the whole context; for, on the same principle, the persons in the same proviso "engaged in the calling of miller, wharfinger, master of a vessel, or carrier," must be different persons from the "miller, wharfinger, master of a vessel, or carrier," used in the clause in the original Act, of which the proviso forms a part. The 31st Vic. ch.

*The Chief Justice and Wilson, J., having been absent during the argument, took no part in the judgment.

11, which is but a consolidation of the previous Acts, where the body of the clause and the proviso can be read together, very plainly, to my mind, shews that one and the same person is meant by the two designations. There is no difference in the expressions either in form or substance that I can perceive. Neither can I concur in the argument that any bailee of goods may, by a receipt in the above form, constitute himself a "warehouseman" within the Act. The particular persons named in the Act are, it is true, bailees, but they are only a few of the many persons who are bailees, and the privileges being confined to the few named, all others are excluded. The argument involves a perversion of the maxim "*omne majus continet in se minus*" into "*omne minus continet in se majus*." I cannot agree that it was the intention of the Legislature to enable any tradesman or artificer, as observed by the learned Chief Justice at the trial, by a receipt of this kind, purporting to cover some of the articles of his trade or workmanship, to constitute himself a "warehouseman" of those goods for another, or, as Mr. Paterson admitted his argument involved, to turn a farmer, who had a larger barn than he could himself fill, and who should accommodate a neighbour, by permitting him to store in his barn a portion of his grain, for which he had himself no room, a "warehouseman," within the meaning of the Act, for the neighbour so accommodated.

With one portion of Mr. Paterson's argument I fully concur, namely, that full effect should be given to the provisions of these Acts, and, I add, to all Acts, and that whether they be beneficial or not. With that I have nothing to do: my duty is to construe an Act, by the light of its language, according to the best of my judgment, and when I find that the Legislature, in what I conceive very plain terms, has limited the dealings of Banks, in relation to these receipts, to a particular class of persons, I think I best discharge the duty imposed on me, of giving effect to the provisions of the Act, by not extending it so as to include a different class, and by holding, as I do, that the persons who appear to have manufactured

those receipts, and who, according to the evidence, never were "warehousemen," according to the known and universally viewed acceptation of the term, were not warehousemen," nor was either of them a "warehouseman," within the meaning of the Act, when these transactions took place, and consequently that the nonsuit was right, and that this rule must be discharged.

Rule discharged.

BALSAM AND WIFE V. ROBINSON.

Pro. note to wife before marriage—Debt partly due to wife in representative character—Accord and satisfaction entered into with her—Married Woman's Act—Pleading.

To an action by husband and wife, on a promissory note for \$600, made to the wife before marriage, defendant pleaded that the wife was formerly the widow of one C., to whom defendant had been indebted in \$400; that she subsequently took out letters of administration to his personal estate, and that afterwards defendant became indebted to her in \$200.; that the note declared on was for these two sums, and that after its maturity, with the knowledge and assent of her husband and co-plaintiff, she agreed with defendant to accept from him a conveyance in fee of certain lands in full satisfaction and discharge of her claim on said note; that defendant accordingly executed a proper deed of said lands to her, duly registered and tendered the same to her before action, and that she never expressed any dissent from said agreement until after said tender:

Held, on demurrer, a bad plea; first, as not averring that there was no marriage settlement, so as to bring the case within the provisions of C S. U. C. ch. 73; secondly, because the accord and satisfaction attempted to be set up being, as to two-thirds of the amount, in respect of a sum due to the wife in her representative character, was not pleaded as having been made with her husband; thirdly, because what was pleaded was the *agreement* to accept a deed in satisfaction, but the *acceptance* in satisfaction was not only not pleaded, but was shewn by the plea not to have taken place:

Held, also, that had it been the agreement to convey the land which was averred to have been accepted, it would have been bad, as not having been alleged to have been in writing, without which plaintiffs would have had no remedy.

McKechnie v. McKechnie, 7 Gr. 23; Muir v. Dunnette, 11 Gr. 85; Childers v. Childers, 3 K. & J. 315, distinguished.

Semble, that the words in the Married Woman's Act, "free from the debts and obligations of her husband and from his control and disposition without her consent," are not to be construed as giving to the wife absolute control and disposition *without his consent*, and remarks upon the danger to her of a different construction.

Declaration, on a promissory note.

Plea, that plaintiff, Dorcy Balsam, was formerly the widow of one Thomas Crooks, deceased, to whom defendant had been indebted in \$400; that after decease of said Crooks, plaintiff took out letters of administration of his personal estate and administered the same; that afterwards defendant became indebted to said plaintiff in the sum of \$200; that while defendant was thus indebted he made to plaintiff the promissory note declared on, in consideration of said two several sums of money; that after maturity of said note plaintiff, with knowledge and assent of her husband, Richard Balsam, agreed with defendant to accept from him a deed, with bar of dower, conveying to her in fee the lands known as town lots (setting them out), in full satisfaction and discharge of her claim on said note; that defendant accordingly executed, in pursuance of said agreement, a proper deed of said lots to said plaintiff, with bar of dower, bearing date the tenth day of September last; that said deed was duly registered, &c., and tendered to plaintiff before commencement of action, and that she never expressed any dissent from said agreement till after said tender.

Demurrer:

1. Not shewn in said plea that alleged agreement was made by plaintiff, Dorcy, before her intermarriage with plaintiff, Richard Balsam, and if made by her during her coverture alleged agreement would not be binding.

2. Alleged agreement not stated to have been in writing, and being by parol merely, it would not be binding on any of parties.

3. Said plea not a good plea of accord and satisfaction, and no answer to plaintiffs declaration, as containing no averment either that alleged agreement was ever accepted in satisfaction of cause of action, or that alleged deed was ever so accepted or received in satisfaction.

4. Not apparent from said plea that alleged accord was ever executed or satisfied.

Harrison, Q., C., for the demurrer, cited Con. Stat. U. C.

ch. 73, sec. 1; *Kraemer v. Gless*, 10 C. P. 470; *Johnston v. Cowan*, 25 U. C. 470; *Hall v. Flockton*, 14 Q. B. 380; *Reaves v. Hearne*, 1 M. & W. 323.

McGregor, contra, cited *Gore v. Wright*, 8 Adol. & Ellis, 118; *Souch v. Strawbridge*, 2 C. B. 808; *Gray v. Hill*, Ryan & Moo. 420; *McKechnie v. McKechnie*, 7 Grant, 85; *Muir v. Dunnette*, 11 Grant, 85; *Doe de Garnons v. Knight*, 5 B. & C. 671; *Sear v. Ashwell*, 3 Swans. 671, 411, note; *Childers v. Childers*, 3 Kay & John. 310; *Way's Settlement*, 10 Jur. N. S. 1166.

GWYNNE, J.*—The plea demurred to in this case professes to be a plea by way of accord and satisfaction, entered into between the defendant and the plaintiff Dorcy Balsam, the wife of the plaintiff Richard Balsam, and which, it is contended, has been perfected by the conveyance by the defendant to the wife, in fee, of certain lands in bar of the action, by husband and wife, upon a promissory note made by the defendant, payable to the wife before her marriage. The defendant contends that, by reason of the provisions of 22nd Vic. ch. 73, Consolidated Statutes, of Upper Canada, the plea is good.

I am of opinion that the plea is insufficient in law, and offers no bar to the action, for several reasons.

Where a party finds it necessary to avail himself of the provisions of a Statute, which creates, in a certain contingency, an exception from the rules of the common law, he must by his pleading shew that the contingency has arisen, which gives, as it were, birth to the operation of the Statute.

The Statute, of which the defendant desires to avail himself, in support of this alleged contract with a married woman, comes into operation only in the event of there not having been any settlement executed upon the marriage. It is not alleged that in this case there has been no marriage settlement, and so the defendant has failed to

* Hagarty, C. J., and Wilson, J., not having been present during the argument, delivered no judgments.

establish the first step necessary to enable him to set up the contract of accord, which is the foundation of his defence. The facts, however, of the case might possibly enable him to amend in this particular, and I might give him leave so to do, if there remained not other objections which appear to me to be insurmountably fatal to the plea.

The plea shews that, as to the greater part of the consideration of the note, it accrued due to the wife before her marriage with her present husband, in a representative capacity, as administratrix of the estate of one Thomas Crooks, deceased. The husband during the coverture is liable for the acts of his wife in her representative character. In that character, whatever may be her rights under 22 Vic. ch. 73, she has no power to act independently of her husband. He has still the same power over all personal estate vested in her as administratrix as the common law gave him over such property vested in her in her own right, and if he exercises or permits her to exercise the powers vested in her, as administratrix, in an improper manner, he is liable for a *devastavit*: *Addison on Contracts*, 1065, 693; *Adair v. Shaw* (1 Sch. & Lef. 243).

He is, therefore, the person with whom any accord and satisfaction, in respect of a cause of action vested in the wife in her representative character, must be made, and he has an absolute right to interpose to prevent the completion of any negotiations for an accord which may have been entered into with her. The accord and satisfaction, therefore, which has here been attempted to be pleaded, being, as to two-thirds of the amount, in respect of a sum of money due to the wife in her representative character, and not being pleaded to have been made with the husband, must be bad.

But, assuming the wife to have had the right to enter into an accord and satisfaction independently of her husband, or assuming it to have been pleaded to have been made with the husband, or with both husband and wife, still, it is bad as pleaded here. It is not the agreement to convey the land, which is averred to have been accepted in satisfaction. If it had been, it would have been bad, as not

having been alleged to have been in writing; for without an agreement in writing the plaintiffs would have had no remedy. What is pleaded is an agreement *to* accept a deed in satisfaction, but the *acceptance* in satisfaction is not only not pleaded, but is shewn not to have taken place. *Drake v. Mitchell* (3 East. 251); *Reeves v. Hearne* (1 M. & W. 323); *Flockton v. Hall* (14 Q. B. 380); *Callendar v. Howard* (10 C. B. 290), and a host of other cases state that *acceptance* in satisfaction must be pleaded.

It was argued by defendant's counsel that the defendant having executed and registered and tendered the deed, the accord was executed and satisfaction made complete, and he insisted strongly that the estate had passed under the deed, citing *McKechnie v. McKechnie* (7 Grant 23); *Muir v. Dunnette* (11 Grant 85), and *Childers v. Childers* (3 K. & J. 315); but all that *McKechnie v. McKechnie* decides is, that the delivery by a mortgagor of a mortgage deed to an attorney in this country, for the benefit of parties residing in Scotland, who however were ignorant of the fact for some time, was a good delivery and enured to the benefit of the mortgagees who claimed title under it. So *Muir v. Dunnette* only decided that the assignee for value of a second mortgage, which had been retained in the possession of the mortgagor for several months after its execution and was then registered by him a few days before the registration of a prior executed and delivered mortgage, and which secondly executed but first registered mortgage was not delivered to the mortgagee until some time after the registration of the first, and although such mortgagee had no knowledge whatever of the execution of the mortgage until its delivery to him, and had himself no demand against the mortgagor, but was merely a trustee for others, enured to the benefit of the assignee for value from the date of registration, so as to give *him* precedence over the first mortgage, the Court holding that the registration by the mortgagor was such a parting with the deed as constituted delivery, and as enabled the assignee for value to support his title from the date of the registration, upon the authority

of *Childers v. Childers*. Now, what *Childers v. Childers* decided was, that where a father, being desirous of qualifying his son to be elected a governor or bailiff of the Bedford level, which office required a property qualification, executed a deed professing to be for natural love and affection to the son, and caused it to be registered, the son having no knowledge of the deed, and the father having retained the deed in his own possession until the death of the son, who had never been elected to the office, he could not sustain a bill against the heir of the son, claiming the benefit of the deed (as it imported) as a gift for natural love and affection, upon the allegation that he never intended any beneficial estate to pass to the son, because such a contention would have been a fraud upon the Act, which required the qualification, and it was held that, under the circumstances, the registration for the purpose of seemingly giving the qualification to the son did in fact give it, and such a parting with the deed as completed the act of delivery. Here, also, the heir of the grantee named in the deed was claiming the benefit of the deed, according to its tenor, as a gift.

Now, it is plain these authorities can have no application in the present case; for, even granting the estate to have passed, as contended, upon the registration, as to which I am not called upon to express and therefore do not express any opinion, the estate so passed appears not to have been accepted in satisfaction of the cause of action on the note, which is the material point to establish here. What in fact the plea, in substance, sets up here, instead of an accord and satisfaction accepted, is a claim to compel the husband and wife now to *accept* the registered deed in satisfaction; that is, a right which, if it exists, must be enforced in a Court of Equity.

In *Butler and Baker's Case* (3 Co. Rep. 266), referred to in *Xenos v. Wickham* (2 E. & I. App. p. 312), it is said: "If A. make an obligation to B. and deliver it to C. for the use of B., this is the deed of A. presently; but if C. offers it to B., then B. may refuse it *in pais*, and thereby the obligation will lose its force."

So here, when the defendant tendered the deed, it was

refused *in pais* and has lost its force, although the defendant, to get rid of the registry as a blot on his title, may have imposed upon himself the necessity for and expense of a Bill in Equity.

In the view which I have taken it is not necessary to determine the point argued as to the rights of married women under 22 Vic. ch. 73, over their separate personal property during the coverture.

I should hesitate before acceding to the argument, as I understand it to have been urged here. If it should prove to be the law, that the words in the Act, which vest all her real and personal property in herself, "*free from the debts and obligations of her husband, and from his control and disposition without her consent,*" are to be construed as giving to her absolute control and disposition *without his consent*, I fear the result may be to deprive her of the benefit of his advice and protection, while relieving her property from his obligations and control, and may expose her to the contrivances of designing persons, who may persuade her to make bargains and dispositions of her property highly prejudicial to the joint interests of herself and her husband. At present it seems to me that the object of the Act will be sufficiently secured if the law should prove to be that she shall not have the power of disposition without the consent and intervention of her husband, so that he may have an interest recognised in law sufficient to enable him to prevent her making what may be improvident bargains in respect of it, and securing to her the same beneficial interest, as to the corpus, at least, of her personality, as she has in her realty, which, notwithstanding that the word "real" is coupled with "personal" property in the Act, cannot be disposed of effectually otherwise than jointly with her husband. Such a construction I am inclined to think would be more conducive to the preservation of her true interests and the peace of the marriage state than one which would give to her absolute power of disposition without the consent, and, it may be, against the will and advice of her husband.

Judgment for plaintiffs on demurrer.

MIALL & Co. v. THE WESTERN^{*} INSURANCE Co.

Fire insurance—Cancellation of policy after assignment.

Declaration on a fire policy, averring an assignment of the policy, with the assent of the defendants, to A. B., and that the action was brought as well on behalf of A. B. as on plaintiff's behalf. *Plea*, on equitable grounds, that A. B. was never interested in the insured property, and that before the loss the policy was cancelled by an arrangement between plaintiffs and defendants, by which a policy on other goods was substituted and the unearned part of the premium credited by defendants to plaintiffs on account of the new policy:

Held, on demurrer, a good answer in Equity, and *Seemle*, also, a good legal defence.

This was an action on a policy of insurance effected by plaintiffs with defendants on certain buildings and furniture belonging to plaintiffs, alleging the loss of the property in question: *Averment*, that before the loss the policy had been assigned, with defendants' assent, to one McGill, and that the plaintiffs brought the action as well on behalf of said McGill as on their own behalf.

Plea, on equitable grounds, that McGill was never interested in the insured property, and that before the loss the policy was cancelled by an arrangement between plaintiffs and defendants, by which a policy on other goods was substituted and the unearned portion of the premium credited by defendants to plaintiffs on account of the new policy.

Demurrer:—Defendants could not, after alleged assignment of policy, cancel same without consent of said McGill.

Plea set up facts shewing an attempted fraud upon said McGill.

Not necessary that any interest in insured premises should have been vested in said McGill, other than such as he acquired by assignment to him of said policy, in order to prevent plaintiffs and defendants by any agreement cancelling policy without his consent.

Allegations in said plea did not shew that defendants were released from covenants mentioned in declaration (usual covenants to make good any loss).

Assignment to said McGill, with consent of defendants, as alleged in declaration, not denied, and allegation, that said assignment not in fact actually delivered to said McGill, did not deny such a legal delivery as would make assignment operative.

Not alleged that assignment to said McGill voluntary, or that defendants had not notice thereof and of consideration therefor, and Equity would not, under circumstances shewn, unconditionally enjoin said McGill from enforcing policy assigned to him.

C. S. Patterson, for the demurrer, cited *Richards v. Liverpool and London Insurance Company*, 25 U. C. 400; *Davies v. Home Insurance Company*, 24 U. C. 364; *Smith v. Provincial Insurance Company*, 18 C. P. 223; *Smith v. Royal Insurance Company*, 27 U. C. 54; *Mayor of Berwick v. Oswald*, 1 E. & B. 295; *Spence v. Healey*, 8 Ex. 668; *Add. Con.* 915; *Burton v. Gore District Mutual Insurance Company*, 12 Gr. 156; *Livingstone v. Western Assurance Company*, 14 Gr. 461; *Stinson v. Pennock*, 14 Gr. 604.

Harrison, Q. C., contra, contended that plaintiff could not recover on his own behalf, because he was estopped; nor could he recover for McGill, because it was untrue that McGill had any interest and the contract was gone.

He further contended that a person could not recover unless he had at the time an insurable interest in the property: *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Sadler's Company v. Badcock*, 2 Atk. 554; that in all the cases cited for the plaintiff, the assignee had such an interest; that if he had only an equitable interest he had no *locus standi* at law. He also referred to *Shaw v. Ross*, 20 U. C. 262; *Gulliver v. Gulliver*, 1 H. & N. 174; *Hunter v. Gibbons*, 1 H. & N. 459; *Reis v. Equitable Insurance Company*, 2 H. & N. 19; *De Roo v. Foster*, 12 C. B. N. S. 472; *Beaver v. Anchor Insurance Company*, 16 U. C. 485; *Tillou v. Kingston Insurance Company*, 7 Barbour,

(N. Y.) 570; *Robert v. Traders' Insurance Company*, 17 Wend. 631.

GWYNNE, J.*—The argument in support of this demurrer was, that the plea was no answer to the declaration, because it offers no legal defence in bar of the action being brought by Miall & Co., as it sets up neither a release nor performance of the covenant contained in the policy, but only offers an equitable answer to Miall & Co's right to recover for their own benefit, and does not displace their right to sue at law for the benefit of McGill, as assignee; and that therefore McGill was entitled to recover, in respect of Miall & Co's legal interest in the policy, for his, McGill's, interest under the assignment, although that interest consisted in a naked assignment of the policy, without his having ever had any interest in the subject of the insurance.

The plea, in substance, alleges that before any loss occurred, and before McGill had any interest whatever in the insured premises, or any part thereof, to wit, on the 1st of October, 1867, Miall & Co., having resolved to move their stock insured to other premises in the village of Oshawa, and being desirous of cancelling the policy declared on, and of effecting a new policy for a larger amount on their stock-in-trade in their new premises, made application in writing to the defendants, requesting them absolutely to cancel and annul the policy declared on, and to effect a new insurance for Miall & Co. to the amount of \$8,800 on stock-in-trade in the new premises, and to apply the unearned portion of the premium on the first policy, which, in the application for the new one, is referred to as "now cancelled," viz: \$75 as part payment of the premium on the new one; that this was agreed to by the defendants, and, upon the application so made and accepted, Miall & Co. paid \$145, which, with the \$75, was accepted by the defendants as premium paid upon a new

* The Chief Justice and Wilson, J., having been absent on official business during the argument, took no part in the judgment.

policy, which was then issued by the defendants under their corporate seal, insuring Miall & Co. in the sum of \$8,800 on their stock-in-trade in their new premises for one year, in which it was declared that the policy declared on was cancelled, and delivered the new policy to Miall & Co., who accepted and received the same from the defendants, and that it is still in force; and that thereupon and thereby and before the alleged loss the policy declared upon became and was wholly cancelled and annulled, and that McGill *had not at the time of such new policy being issued, nor at any time*, any title or interest whatever in the insured premises, or any part thereof, and that the alleged assignment to him was never delivered until after the alleged loss.

It is objected that this plea does not allege that the new policy was issued before the assignment of the old one to McGill. Technically it does not, although, perhaps, under the circumstances above stated, it might well have done so; but the omission of that averment does not appear to me to make the plea substantially defective, because, for the purposes of this argument, it must be taken to be admitted that, at the time of the issuing of the new policy, which is set up as the cancellation of the one declared on, McGill had not, nor had he at any time, any title or interest whatever in the subject of the insurance.

If this, then, be so, the plea displaces the right to sustain the action in virtue of an interest in the insured premises, and in the policy in respect thereof, alleged in the declaration to have been transferred to McGill before the loss. The test of the validity of the plea, in so far as McGill's interest is concerned, which I put to Mr. Patterson during the argument, which he agreed was a fair one, seems to me to be sound; namely, would a replication to this plea, asserting a naked assignment of the policy to McGill, and admitting that no title or interest in the insured premises was ever transferred to or vested in him, be a good replication? And I think that it would not, for the reason that in such case the replication would be a departure

from the declaration : *Iron Works v. Steam Packet Co.* (13 C. B. N. S. pp. 378, 380) ; *Hunter v. Gibbons* (1 H. & N. 464) ; *Reis v. Scottish Equitable Life Assurance Society*, (2 H. & N. 19). The rule laid down in this latter case is, that the replication is bad, if, on the whole matter being set out in the declaration, the declaration would be bad.

It is not necessary for me to say here whether or not an assignee can sustain a bill in equity upon a policy, in virtue of a naked assignment of it, without any interest whatever in the subject of the insurance. My impression, however, is that such an assignment operates merely as a contract between the assignor and the assignee, entitling the latter to receive whatever the former may be enabled to recover under the policy. It is sufficient for me, upon this demurrer, to say that in my opinion the plea, regarding it merely as an equitable plea, displaces the right, asserted in the declaration, to recover either in virtue of any interest in Miall & Co., or in McGill, as it is admitted that the latter had never any interest whatever in the subject of the insurance, and that no action at law can be sustained in virtue of a naked assignment of the policy, without any interest in the subject of the insurance ; but I am not at all satisfied that the plea is not a good legal defence. It was contended it was not, because the policy in the declaration, being stated to be under seal, the plea shewed neither a release nor performance, one or the other of which was contended to be the only answer which could be pleaded at law, and *The Mayor of Berwick v. Oswald* (1 El. & Bl. 295) ; *Spence v. Healey* (8 Ex. 668), and *Addison on Contracts*, were cited in support of this view. The rule is "*unum quodque ligamen dissolvitur eo ligamine quo ligatur.*" In *Addison on Contracts*, 1077, it is said, "The making of a new contract, and the substitution thereof in the place and stead of the original contract, before breach of the latter, operates as a discharge and extinguishment of the original contract, and is pleadable in bar as a release, provided the substituted contract is of the same degree as the original contract. One deed may be substituted for

another, provided the substitution appear by the substituted contract, or by comparison of the two." So in *Pothier* on Obligations, part 3, ch. 2, p. 434, treating of Novations, it is said: "A novation may be made in three different ways. The first takes place when a debtor contracts a new engagement with his creditor in consideration of being liberated from the former." In *The Mayor of Berwick v. Oswald* the plea was held bad, because it shewed no reason why the two deeds should not stand concurrently together, and the latter contained nothing inconsistent with the continuance of the former, or which could operate as a release of it.

In *Spence v. Healey* the declaration was on a covenant to pay a sum certain six months after notice requiring payment; the plea was that before action, and before breach, the defendant satisfied and discharged the plaintiff's claim by delivering to him goods, machinery, fixtures and chattels. That plea was held bad as a parol satisfaction before breach of a sum certain secured by a covenant; but Parke, B., there says: "Whenever damages only are sought to be recovered, such a plea affords a good answer to the action; but where the covenant is for the payment of a sum certain, the covenantee has a right to object that the discharge is not by deed." Now, the policy declared on contains no covenant for the payment of a sum certain, but a covenant depending on a contingency, namely, the loss by fire; to indemnify the insured against such loss by payment of such damages as he shall suffer; so that *Spence v. Healey* would seem to be authority that to such a covenant a parol accord and satisfaction before breach might be pleaded. So in *Blake's Case* (6 Rep. 44 a.) it was resolved by the whole Court that "when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea." But it is not as an accord and satisfaction, though the circumstances might have warranted such a plea, but as an extinguishment of the

first policy and its covenant, sufficiently appearing in the plea, by the second policy and its covenant, executed in substitution for the first, that I think the plea shews a good legal defence, although pleaded on equitable grounds. The rule *unumquodque ligamen dissolvitur eo ligamine quo ligatur* is not infringed upon. A policy of insurance, although under seal, is not like a deed conveying an interest in lands. It may be cancelled in divers ways *in pais*, as, for example, tearing off the seal, *animo cancellandi*, or, it would seem, endorsing a memorandum in writing, with the consent of the parties, and the intention of cancelling will operate as a cancellation: *Xenos v. Wilkham* (2 E. & I. Ap. p. 309); but here the case is stronger, for a new deed for a larger amount, executed with the intent of cancelling the former, the consideration or premium paid in the former being applied and taken as a premium upon the second, is substituted for the former, which appears to me a good cancellation in law of the former policy.

If McGill's interest be only of the nature admitted in the argument, this decision cannot, I apprehend, prejudice him; for if he had an interest, as against Miall & Co., under the first policy, equity will, I presume, attach that to the substituted one, without effecting the wrong to the defendants which the plaintiff's recovery against them, upon the facts admitted on this record, would effect.

. *Judgment for defendants on demurrer.*

BANK OF MONTREAL V. HARRISON.

Setting aside Judge's order—Laches.

Held, that an application not made until the last Thursday of Michaelmas Term, and for a rule returnable the following Term, to rescind a Judge's order, made 27th Oct. previously, discharging a summons to set aside a judgment and execution, was too late, and the rule was discharged with costs.

On Thursday, 3rd December, being the last Thursday of

Michaelmas Term, *Harrison*, Q. C., obtained a rule calling on plaintiff to shew cause, on the first day of this Term, why a final judgment should not be set aside for irregularity, or on the merits, and why an order of Draper, C. J., discharging defendant's summons for same relief, should not be rescinded.

Palmer shewed cause, and took the preliminary objection that the application was too late.

Harrison supported his rule.

HAGARTY, C. J., delivered the judgment of the Court.

Judgment had been signed, for default of appearance, on 8th October last; the summons to set it aside granted 14th October, and the order discharging the same made October 27th. Term began November 17th. Execution had been issued since October.

1 *Lush* Pr. 457: "If he has an opportunity, in vacation, of applying to a Judge at Chambers, he cannot wait till the term," citing *Cox v. Tullock* (2 Dowl. 471); "but if the Judge decides against him, he may move the Court within the first four days of the following term. If the decision of the Judge is in term, he must come to the Court promptly. When a summons was dismissed on Friday, 23rd, and execution issued on 27th, an application to this Court on 28th was too late," citing *Shield v. Quick* (8 M. & W. 289).

2 *Arch.* Pr. 1609: "If the order was made in term, the party dissatisfied with it may immediately apply to the Court to have it set aside; or, if made in vacation, he may apply to the Court in the following term to have not only the order, but also all other proceedings, which have been had under it, set aside. The application should be made within a reasonable time, and, if practicable, before the order has been acted on."

Bright v. Bell (1 Ex. 466)—A Judge's order was made 6th July, 1846; application made to rescind on last day of Trinity Term in the year following. Pollock, C. B.: "This application is greatly too late: it ought to have been made in the first four days of Michaelmas Term last year."

Alderson, B.: "The application should have been made in Michaelmas Term last year,"

Clement v. Weaver (4 Sc. N. R. 229)—An order was made 23rd October; costs taxed 26th October; on 4th November plaintiff's attorney received notice that unless the costs were paid the following day the Judge's order would be made a rule of Court; the order was made a rule of Court on the 9th, and motion to set aside was made 13th November, in Michaelmas Term. Tindal, C. J.: "When a party applies to the Court to set aside a Judge's order after the lapse of a reasonable time, and after it has been made a rule of Court, I think he ought to take nothing by his motion.

* * * The defendant was induced by the laches of plaintiff to take further steps and to incur expense: however objectionable the original order might have been, he cannot be allowed now to call it in question."

Thompson v. Carter (3 Dowl. 657). Order was made 3rd April; it was then made a rule of Court of Easter Term, demand of costs made and attachment issued, and in same term (precise day not mentioned) a rule obtained to set aside the order, and the Court held it was too late.

In *Collins v. Johnston* (16 C. B. 612) the Court adopt the rule of practice laid down in *Meredith v. Gittins* (21 L. J. 273), "that all applications to review the decisions of a Judge in Chambers should be made in the ensuing term."

Buffalo & Lake Huron Railway v. Hemingway (22 U. C. 562) notices this in the practice.

Oldham Building Company v. Heald (3 H. & C. 132). A Judge had refused to make absolute a summons for plaintiffs' recovery of costs, on the 4th and 8th April. Term (began as we find, by reference to Law List, 1864,) April 15th, and ended May 9th. On 28th April a rule was obtained to shew cause why plaintiff should not have his costs, and on May 6th it was argued. It was objected that, being in the nature of an appeal from the Judge's decision, and the rule not being obtained for three weeks after his decision, it was therefore too late. Counsel, in reply, says that it may be made at any time within the term next

after the decision, referring to *Meredith v. Gittens*. The Court does not in any way notice the question of delay, but made the rule absolute on the merits.

The utmost the defendant can argue from this case is that the Court allowed the motion in the second week of the Term, duly returnable and actually argued and disposed of during same terms several days before its termination.

We are asked here to go a step further than any case produced, and to hold that a defendant, against whom an execution is in the Sheriff's hands, and an order made refusing to set it aside, having over twenty days of vacation to prepare himself for Term, beginning 17th November, then waits till the 2nd or 3rd December, towards the end of the last week of Term is still in time to move a rule returnable on its face in the following Hilary Term. We think any person against whom execution is out and property under seizure and expenses necessarily accumulating, is bound to use reasonable diligence, and in such a case as that before us, at least to move at such a time in the next ensuing Term that, according to the practice, the motion would be one to be ordinarily heard and disposed of that term, and that he cannot move so late as to be compelled to make his rule returnable the next term.

We are of opinion that the application is too late, and the rule must be discharged with costs.

Rule discharged, with costs.

THE QUEEN v. JACKSON.

Indictment—Ownership of chattels—Amendment—Evidence of representative character.

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead, and the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection that the property in the cattle was wrongly laid, the indictment was amended, by stating the goods to be the property of the mother. The case proceeded, and no further evidence of the administrative character of the mother was given, the County Court Judge holding the evidence of R. M. sufficient, and not leaving any question as to the property to the jury:

On a case reserved, *Held*,

- 1st. That there was ample evidence of possession in R. M. to support the indictment without amendment.
- 2nd. That the Judge had power to amend under Con. St. C. ch. 99, s. 78.
- 3rd. That the conviction on the amended indictment could not be sustained, as the Judge had apparently treated the case as established by the fact of the cattle being the mother's property in her representative character, of which there was no evidence; nor was any question of ownership by her, apart from her representative character, left to the jury.

Case reserved by the Chairman of the Quarter Sessions for the County of Norfolk.

The prisoner was indicted for stealing cattle, the property in which was laid in one Robert McKim.

McKim, on his examination in chief, swore that he owned the cattle; that he had lost them; that they were in one of his fields; that he had found them in possession of one Wallace; that he had bought them as four year old past; and that he had heard that they had been sold at the market by prisoner to a butcher. On being recalled, witness stated that his father was dead; that he was nineteen years of age; that the cattle had been bought since his father's death; that the money was the proceeds of his estate; that his mother was administratrix; that he was the eldest son, and had the general management under the advice of his mother.

On this the County Attorney moved to amend the indictment by erasing the name "Robert McKim," and

inserting in lieu thereof " Mary McKim, administratrix of Thomas McKim, late of," &c. Prisoner's counsel objected to this amendment, which however was allowed, subject to the reservation hereinafter mentioned, and the case proceeded. Evidence was then given by several parties, some of whom knew the cattle as belonging to the McKims and to others of whom the prisoner had offered them, and of the person who had purchased them from him; but no further evidence was given of the representative character of the mother, and it was therefore submitted, on behalf of the prisoner, that no case had been made against him under the indictment, as amended, as no legal evidence had been given of the mother's representative character or ownership, as set forth in the indictment. This objection was also overruled, the learned Judge leaving the case to the jury, and holding that the evidence of the son was sufficient on this point, and not submitting any question to them as to the property.

The prisoner was convicted.

The following questions were reserved for the opinion of this Court :

1st. Whether the said amendment could be and was legally and properly made under the circumstances ?

2nd. Whether the evidence, after the said amendment, was legally sufficient for the jury to convict the prisoner ?

C. Robinson, Q. C., for the Crown, cited *Rex v. Scott*, R. & R. 13 ; *Rex v. Goby*, R. & R. 178 ; *Rex v. King*, 4 F. & F. 493 ; 1 *Hale*, 514.

Anderson, contra, cited 14 & 15 Vic. ch. 100, s. 1 (Imp.) ; C. S. C. ch. 99, sec. 78.

HAGARTY, C. J., delivered the judgment of the Court.

The amendment of the name of the owner of the property in the indictment was quite unnecessary, as the evidence, as presented to us, was sufficient to shew an ownership in the stolen property in Robert McKim.

First, as to the power of amendment. It was pressed upon us that it cannot be done under our Canadian Act.

The Imperial Act, 14 & 15 Vic. ch. 100 (passed in 1851) specially provided for such an amendment being made in (amongst other matters) the ownership of any property named or described in an indictment. Our Act of 1855, (18 Vic. ch. 92) gives the power in a more succinct form: "Whenever, on the trial of any indictment for any felony or misdemeanour, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in names, dates, places or other matters or circumstances therein mentioned, not material to the merits of the case, and by the misstatement thereof the person on trial cannot be prejudiced, &c., it shall be lawful for the Court to order such indictment to be amended according to the proof, &c." The same form of words is used in the Consol. Canada, ch. 99, sec. 78.

The preamble to our Act 18 Vic. ch. 92, commences in words like the Imperial Act; that it is desirable to relax technical strictness in criminal proceedings, in matters not material to the merits of the case. This does not appear in the Consolidated Act.

We think there is no doubt of the power to make such an amendment under the general words of our Statute.

It might, perhaps, have been on the whole better to have followed the precise enumeration of cases in which amendments may be made in the Imperial Act; but, as the general language of our own Act is at least as wide and comprehensive in its terms, we cannot hold that it does not cover the case of the ownership of property in an indictment.

In the vast majority of felonies the name of the owner of property stolen is a matter in no wise touching any material part of the case, or the full defence of the prisoner charged.

It may be quite possible to suppose a case in which the true ownership of property may be of the essence of the case, and also a case in which an amendment might seriously prejudice the defence; but full protection is given by the statute to prisoners in such cases, and no

Judge can be supposed likely to amend except in cases where the statement of actual ownership, existing in one or more persons in property charged to have been stolen, is really a matter quite beside the guilt or innocence of the prisoner.

We find, on consultation with the other Judges, that such amendments are frequently made, and we do not think there is any reasonable doubt of the authority to make them.

We think there was no legal evidence of the mother being administratrix. Had the evidence been a little more explicit, it is quite probable that there might have been sufficient to go to the jury to shew a property in her, without reference to her representative character. We refer to *Regina v. King* (4 Foster & F. 493), as very much in point. But we do not understand from the case reserved that any question as to ownership was submitted to the jury or found by them. When the objection of deficiency of proof of the representative character was made, the learned Judge says, "I also overruled this and submitted the case to the jury, subject to the reservation hereinafter next mentioned, and the jury convicted the prisoner."

We would infer from this that, as the evidence was, on the objection, held sufficient, nothing was left to the jury as to the ownership. The questions reserved were, 1st. As to the power to amend, which we have disposed of. 2nd Whether the evidence, after the amendment, was legally sufficient to convict.

With the ruling as to the administrative character previously given, and the manner in which the case must consequently have gone to the jury, we feel constrained to say that we cannot uphold the conviction. We have no power to draw inferences of fact. The case went to the jury with a ruling that there was evidence of the administrative character. This we think was incorrect, and there does not appear to have been any question left to them as to the ownership in the mother, apart from her alleged right under an administration not proved.

Conviction annulled.

MACAULAY V. RUMBALL ET. AL.—CRABBE, GARNISHEE.

Garnishment—Debt due judgment debtor, as executor, and assigned—Attaching order, set aside—Costs.

A debt due by the garnishee to the judgment debtor as executor, is not garnishable, nor a debt duly assigned to another, and the attaching order will be set aside by the Court; and where the judgment creditor was aware that this answer would be made to his application by the judgment debtor, the latter was allowed the costs incident to such answer.

In Michaelmas Term last *S. Richards*, Q. C., obtained a rule calling on Parsons (judgment debtor) and Crabbe (garnishee) to shew cause why Crabbe should not pay to plaintiff the debt due by him to Parsons, or pay it into Court, or dispute or not dispute the debt due Parsons, or, if he did not dispute, why execution should not issue against him; or, if he disputed, why judgment creditor should not proceed against him by writ, &c.; or why a feigned issue should not be ordered between the said judgment debtor Geo. H. Parsons and the judgment creditor, to determine whether the debt due from garnishee was due to Parsons personally or as executor, and if due, whether it had been validly assigned, and such order be made as to Crabbe as the Court might direct; or to refer the matter back to a Judge in Chambers, with such directions as this Court might think proper.

This rule was drawn up on the affidavits and papers filed in Chambers and refiled in Court, and the affidavits of Crabbe, Detlor and J. V. Detlor, and the attaching order and indorsements.

An attaching order was obtained, 17th October last, against all debts due from Crabbe to Parsons, and the usual summons to pay over, which was enlarged to term.

J. A. Boyd now shewed cause, reading the affidavit of Parsons, which stated that the judgment recovered by plaintiff was on a note for \$500, which he endorsed to secure a debt due by Rumball and James Parsons, his brother, to plaintiff; that the note was collateral security for an instalment

of a mortgage given by Rumball and James Parsons on a steam vessel bought by them from plaintiff; that a suit was pending by him against Crabbe; that the attorney for plaintiff was also attorney for Crabbe in deponent's suit, and he feared if an issue were directed to ascertain whether the debt was due to him personally or not, Crabbe would not contest it, but would set up payment, under the order of garnishment, as a defence; that Crabbe's debt to him was for an engine and boiler sold to him; that these things belonged to deponent and two others, executors of Benjamin Parsons, deceased, and his co-partner, John McDonald, for whom also deponent was acting; that the suit was brought in his own name alone; that by deed of 7th November, 1861, the executors assigned all the estate of Benjamin Parsons to one Haldane, of Goderich, and Thomas Morland, of Montreal, in trust for creditors, and by deed of same date deponent assigned his estate to them for the benefit of his creditors; that a Chancery suit had been instituted by the executors and said assignees against McDonald for an account, and a reference ordered to the Master to take the accounts, and whatever amount was recovered from Crabbe would be brought into the account; that deponent had no personal interest, save as executor; that plaintiff's judgment was against him personally, and was long after his assignment, and this sale to Crabbe was prior to the assignments.

He also read an affidavit made by Mr. Davidson, attorney for Parsons, stating that he knew the engine and boiler sold to Crabbe to have been the property of the partnership firm of Benjamin Parsons and J. Macdonald, and also proving the assignments, and swearing that he acted for the assignees in carrying them out and in bringing the suit against Crabbe for them, and not for George Parsons; but that the contract, being evidenced by a letter written by Crabbe to Parsons, the suit was brought in his name, though Parsons never pretended to have any beneficial interest in it. He also proved the Chancery suit, and McDonald's admission that the sale of the engine and boiler was with

his assent, and the executors were to receive the benefit thereof in reduction of their claims on the co-partnership, and it was well known that George Parsons was acting as executor.

Mr. Boyd, Mr. Davidson's term agent, himself swore that an application had been lately made for security for costs by the defendant Crabbe, in Parsons' suit, against him, based on the statements made by Parsons in his affidavit; that the suit was prosecuted on behalf of the assignees for the benefit of creditors.

He cited *Brassington v. Ault*, 2 Bing. 177; *Williams v. Rook*, 4 C. B. N. S. 434; *Wise v. Berkinshaw*, 29 L. J. Ex. 240; *Wintle v. Williams*, 3 H. & N. 288; *Bank of Upper Canada v. Wallace*, 2 Pr. Rs. 352; *Gwynne v. Rees*, 2 Pr. Rs. 282; *Wood v. Dunn*, L. R. 1 Q. B. 77, S. C. L. R. 2 Q. B. 73; *Davidson v. Douglass*, 12 Gr. 181; *Gulverhouse v. Wigan*, L. R. 3 C. P. 295.

S. Richards, contra, read an affidavit made by Crabbe, not denying his debt to Parsons, but stating that he bought the goods from him, as he thought, as his own personal property, and never understood it was otherwise. He set out part of the two assignments, and urged that no mention was made of the articles sold, nor did they pass thereby; that George H. Parsons' assignment, made after this sale, assigned all debts due to him, and the executors' assignment transferred all book debts, notes, credits, securities, &c., belonging to the estate. He denied collusion with the plaintiff.

Crabbe did not appear to oppose the motion.

HAGARTY, C. J., delivered the judgment of the Court.

I see no reason to doubt, on all these affidavits, the reality of George Parsons' assertion, that the debt due by Crabbe belonged to the late firm of Benjamin Parsons and McDonald, and was sold by him as part of that estate; nor is it attempted to be denied that both he and the executors of Benjamin Parsons assigned to the parties in Montreal. Mr. Davidson's affidavit is clear on both points.

In either case the debt in question cannot be garnished for George Parsons' debt to the judgment creditor. This view of the facts renders it wholly unnecessary to discuss the several courses proposed by Mr. Richards in his rule.

The statements on Parsons' side are really not seriously impugned. The only contest of fact is about a matter quite beside the question before us, viz., the correctness of the judgment obtained by Macaulay and the sum due thereon, and some alleged grievances of Mr. Crabbe as to the conduct of the suit or suits brought against him by Parsons ; also matters irrelevant to this motion.

We discharge the rule. We think there is no such question of fact in issue as to warrant our directing a feigned issue, even if we had the power so to do.

We think we ought also to discharge the attaching order. It ought not to be allowed to stand to the embarrassment of the parties, when it clearly appears to the Court that the debts sought to be garnished cannot be so treated.

In *Wintle v. Williams* (3 H. & N. 288) the Court set the order aside, the garnishee shewing that he held the money sought to be garnisheed in trust, to be divided amongst the judgment debtor's creditors, and the judgment creditors declined taking an issue. Here the garnishee makes no opposition, but seems willing to assist the judgment creditors.

As to the duty of garnishees, who have notice of any matter against the right to garnish, we refer to *Wood v. Dunn*, in Exchequer Chambers, (Law Rep. 2 Q. B. 73). It would seem, at all events, where the judgment debtor becomes bankrupt or insolvent before the payment by garnishee to judgment creditor, the assignees of the debtor may recover it from the payee, as money received to their use.

As to costs, the judgment creditor, before moving in term, was fully aware from the affidavits already filed what the line of defence was ; yet, with this knowledge, and having no substantial answer to give to such defence, the motion is still made : it seems only just that the costs of answering the rule should be allowed to judgment debtor.

Rule discharged, and attaching order rescinded.

KERNS V. PHELAN.

Trespass—Conditional garnishee order—Execution thereunder—Irregularity.

Defendant obtained a garnishee order directing execution to issue against plaintiff, but the order was conditional, giving the garnishee the opportunity to contest the claim, on payment of certain costs within a time fixed, after the lapse of which the *fi. fa.* issued, plaintiff not having availed himself of the alternative allowed by the order. It appeared that both parties were present when the order was made, and that there had previously been a good attaching order. No motion was made to set aside the *fi. fa.*, which appeared good on its face, but plaintiff brought trespass against defendant for the seizure under the writ, as having been issued on a conditional and void order:

Quære, whether the order was void; but if so, *Semble*, that the *fi. fa.* was at most irregular, and might have been set aside on motion; and therefore, *Held*, that, as nothing appeared either on the face of the record or on the evidence making the writ a void process, defendant was protected by it and trespass would not lie against him.

Trespass to goods, with money counts.

Pleas: 1st. Not guilty. 2nd. Never indebted. 3rd. That plaintiff recovered judgment against Florence and Timothy McAuliffe in County Court; that an attaching order was obtained by defendants from the Judge against all debts due by the now plaintiff to Timothy McAuliffe, and the Judge, on the now defendants' application, issued an order that plaintiff should appear at a time and place named and shew cause why he should not pay, &c., and plaintiff appeared thereupon and produced affidavits to Judge respecting the debt, and submitted to the Judge and his jurisdiction, and agreed that the Judge should make such order as should seem meet to him, &c., whereupon the Judge made an order that execution was to issue to levy £4 10s., being the amount found due by plaintiff, which said orders, &c., were still in force, whereupon execution was issued under the Statute (setting forth the execution from County Court to Sheriff, and seizure by Sheriff thereupon), *quæ sunt eadem*, &c.

Issue.

The case was tried at Lindsay before A. Wilson, J.

The seizure by the Sheriff was proved under execution

produced, plaintiff protesting against it; also the following proceedings :

1. An attaching order, 3rd February, 1866, made by Judge Boucher in the County Court suit.

2. Summons, 1st March, 1866, on plaintiff Kerns to pay over to the judgment creditor.

3. Order, 3rd April, 1866, to pay over on reading summons, &c., and Kerns not appearing.

4. Order, 7th June, 1866, on reading the previous proceedings and hearing the parties for judgment creditors, for issue of execution against Kerns, garnishee, for \$18, with costs, unless garnishee paid to judgment creditor his costs of the order and affidavit, &c., to be taxed, within ten days, in which event judgment creditor might sue garnishee in Division Court, County of Peterborough, where judgment creditor resided, and where order had been made and adjudicated on.

5. Summons, 4th April, 1866, on judgment creditor to set aside order of 3rd April, directing garnishee to pay over, and to allow garnishee to shew cause to summons, on grounds set out.

6. Affidavit of Scott, garnishee's attorney, on which this summons was obtained.

7. Affidavit, 9th April, 1866, by garnishee, denying liability.

8. Affidavit of one Dougherty in support.

It was objected for plaintiff that the order of 3rd April, 1866, was not warranted by Statute, as it was to pay over, not for execution to issue.

For defendant, a consent of Scott, garnishee's attorney, was read, dated 31st August, 1866, that the order of 7th June, 1866, be amended, by striking out "enter judgment" and inserting "issue execution," which it was contended, ratified the order, but which plaintiff denied.

For the defence, defendant's attorney proved that, when the summons was taken out to reopen the matter, it was agreed between the parties that the Judge should take the whole matter and make such order as he thought right.

Another witness proved service of an *allocatur* for costs, taxed on the order of 7th June, on Kerns's attorney, the damages being mentioned in the *allocatur* also, and the attorney said Kerns would be down in a few days, and settle.

The evidence of Judge Boucher was read on commission. He said he understood that it was left to him to determine the matter according to the best of his judgment, and that he remembered no objection taken to his jurisdiction.

A good deal was said at *Nisi Prius* about amending the pleadings, but nothing was done.

It was agreed there should be a verdict for defendant, with leave to plaintiff to move to enter verdict for him, for \$46, if the Court should be of opinion he was entitled to recover, the learned Judge's opinion being against plaintiff.

In Easter Term *Scott* obtained a rule on the leave reserved, setting forth many objections to the proceedings; that the order of the Judge was conditional and void on its face, &c.

S. Richards, Q. C., now shewed cause, citing *Newman*, v. *Rook*, 4 C. B. N. S. 434; *Baird* v. *Story*, 23 U. C. 624; *Chichester* v. *Gordon*, 25 U. C. 527; *Glover* v. *Dixon*, 9 Ex. 155; C. S. U. C. ch. 22, s. 299.

H. Cameron, contra, cited C. S. U. C. ch. 22, ss. 289, 290, 291, 293; *Bullen* v. *Moodie*, 13 C. P. 126.

HAGARTY, C. J., delivered the judgment of the Court.

The judgment in the County Court, set forth in the plea and the writ of execution therein mentioned, as ordered by the Judge, according to the Statute, to issue against the garnishee, do not appear to be properly in issue on a replication by plaintiff merely taking issue on the plea. The execution under the Statute, and according to the form given in rule 45, would be a writ under the seal of the Court and a matter of record. The trespass complained of was the seizure by the Sheriff under a *fi. fa.* from a Court of Record.

No attempt was made to set that *fi. fa.* aside, as having been improperly issued, or without a legal order to support it under the Statute.

It seems opposed to principle to have this writ, unless a totally void, and not merely irregular, proceeding, in force, and yet hold the execution of it, according to its exigency, an act of trespass.

Glover v. Dixon (9 Ex. 158) shews that a traverse like the present is in the nature of a general *replication de injuriâ*.

If the suit were wholly void, *Brooks v. Hodgkinson* (4 H. & N. 712) is an authority that trespass lies without setting it aside. The plea shewed a judgment under £20 and *ca. sa.* thereon. *Replication*, that judgment was for less than £20 and was recovered since the 7 & 8 Vic. ch. 96, and no order had ever been made to take the now plaintiff in execution under the proviso in the Act. *Rejoinder*, that the *ca. sa.* was in force and never set aside, and *demurrer* thereto. The Court said it was impossible to get over the words of the Act, that no person shall be taken on a judgment under £20; that the writ was not merely irregular but absolutely void, and that the cases cited were inapplicable.

Amongst them was *Blanchenay v. Burt* (4 Q. B. 707). There, in trespass, a judgment and *ca. sa.* thereon were pleaded by the then plaintiff and his attorneys. *Replication*, that the *ca. sa.* was void and irregular, not having issued within a year and a day after judgment. *Rejoinder*, that it was still in full force and never set aside, &c. *Demurrer*. It was pressed upon the Court that it was absolutely void. The Court said that "the defect amounts to an irregularity, of which the opposite party might take advantage by writ of error, or, on application to the Court, the *ca. sa.* might be set aside; but it is not a mere nullity."

The strongest case on the subject is *Riddell v. Pakeman* (2 C. M. & R. 30). Trespass. *Plea*, justifying under a judgment, on which a writ of *exigi facias* was issued and delivered to Sheriff, and the now plaintiff appeared and

rendered himself to Sheriff, and defendant (the then plaintiff), in his aid by his command, took plaintiff, and for default of bail seized him, &c. *Replication*, that no affidavit was made and filed of record, before the issuing of said writ, according to the Statute. *Rejoinder*, setting out the affidavit. *Demurrer*, objecting to the affidavit as insufficient. The Court gave judgment for defendant. It was conceded that the affidavit was bad, and that defendant might have obtained his discharge on motion. Parke, B. : "When the process is irregular merely, no action for false imprisonment can be maintained until that process is set aside. It is every day's practice, in cases of this kind, where defendant has given a bail bond, or where he has suffered judgment by default, or has been guilty of laches in making the application, for the Court to refuse to interfere; but it has never been supposed in such a case that he had a remedy by an action for false imprisonment. An affidavit to hold to bail, in trover, without a Judge's order, is irregular; but can it be contended that in such a case an action for false imprisonment could be sustained? What distinction is there between that and the present case, the Judges, in this case, not permitting the defendant to be held to bail for the amount of interest."

Alderson, B. : "When process is set aside for irregularity, the Court in general make it part of the terms that defendant shall bring no action. The reason of that is that the right to bring such action accrues upon the process being set aside." Lord Abinger, C. B., said the proceedings were only voidable and not void, and defendant ought to have had it set aside before bringing the action.

Ewart v. Jones (14 M. & W. 778). To a justification under *ca. sa.* it was replied that the now plaintiff, having obtained discharge under the Insolvent Act, was arrested, and on application was discharged by Judge's order. On demurrer it was held that trespass was not maintainable. The Statute directed that after discharge under the Act no person should be imprisoned on a judgment, except in certain cases, and might obtain discharge on application.

Parke, B., said that the Act meant that a plaintiff, who has a suit against the insolvent, *ought not* to issue a *ca. sa.*; not that if issued it shall be absolutely void.

Riddell v. Pakeman was not referred to in *Brooks v. Hodgkinson*.

We may also refer to *McCarthy v. Perry* (9 U. C. 215), where the writ, though set aside as erroneous, was still held by Draper, J., to protect the plaintiff and attorney suing it out.

It appears to me that the distinction must be between a writ wholly void, or expressly prohibited by Act of Parliament, as in *Brooks v. Hodgkinson*, and a writ only irregular and voidable, as in *Riddell v. Pakeman* and *Blanchenay v. Burt*.

In the case now before us I am strongly of opinion that, at most, the *fi. fa.* was irregular only, if the order on which it issued was bad, being conditional, or in the alternative. The order is for an execution to issue, as it has done; but it gave the garnishee the opportunity to contest the claim, on paying some costs in a given time. After the lapse of that time the *fi. fa.* did issue, the garnishee not availing himself of the power. Both parties were before the Judge when this order was made, and there had previously been a good attaching order.

Now, this writ of *fi. fa.* might perhaps have been set aside on motion for some of these matters; but it seems clear to me that plaintiff might have debarred himself from any such relief by laches or other cause; and, if so barred, can it be possible, as suggested by Parke, B., that he could still have an action of trespass? The case put by that very experienced and learned Judge, of an arrest in trover without a Judge's order, is, I think, more open to objection than the present.

In *Chichester v. Gordon* (25 U. C. 527) the plaintiff was arrested on a defective order, bad on its face, no question arising as to any matter of record, like an execution process, issuing thereon.

On the whole, I am of opinion the writ of execution

protects the defendant, and that nothing is shewn, either on the face of the record or on the evidence, making it a void process.

Rule discharged.

ROSS v. TYSON.

Notes held as collateral security for immatured liability on payee's account—Right of holder to sue on notes at maturity—His right, as agent, to sue in his own name—Equitable pleading.

Held, on demurrer to the equitable plea set out below, that, apart from the objection as to a perpetual injunction not being obtainable, the holder of promissory notes, transferred by the payee, as collateral security against a future liability, on the holder's part, for the payee, can collect the notes at maturity before that liability arises, and that the payee has no control over them so as to enlarge or vary the maker's liability to pay them.

Held, also, that the plaintiff, who held the notes, endorsed to him in blank, as his father's agent, could, as such agent, sue upon them in his own name.

Remarks upon the inadvisability of trying an issue in fact first, where there is also a demurrer on the record.

Declaration on five notes, all dated 30th November, 1855, made by defendants, payable to W. B. Smith or order, and endorsed to plaintiff, at one, two, three, and the last two at four years from date.

Pleas.—1st. Payment.

2nd. On equitable grounds, that the notes were transferred by payee, while he was the holder, to one Robert Ross and the plaintiff, as collateral security for payment by Smith of a judgment held against him by Robert Ross, and for payment by Smith of certain notes endorsed by plaintiff; that before this action Smith paid and satisfied part of the judgment, and it was agreed between him and Robert Ross that the balance of this judgment should be settled by Smith procuring a loan on mortgage from Robert Ross to Canada L. C. Co., which Smith was to pay as it fell due, and the notes were thereafter to be held by Robert Ross and plaintiff as collateral for payment by

Smith of said mortgage and of the notes endorsed by plaintiff; that Smith procured the loan and mortgage was given, and the notes declared on were then held by Robert Ross and plaintiff as for such collateral security; and plaintiff in all this acted as agent for Robert Ross and received the notes declared on from Smith for this and no other purpose (with averment of notice of all these matters and that there was no other consideration); and that Smith afterwards and before this action paid the notes endorsed by plaintiff, for payment of which he held the notes declared on as security, and saved him harmless from his said endorsements, and that the mortgage from Robert Ross to the C. L. C. Co. was not yet fully due, but all sums that had fallen due had been duly paid by Smith, and neither Robert Ross nor plaintiff had had to pay anything on the mortgage or on the endorsed notes, and neither had any right to collect the notes declared on; and that Smith before this suit had given defendant an extension of time, and was still willing to extend the time, and that this action was brought without his assent.

3rd. Plaintiff not the holder; 4th and 5th, pleas to common counts.

Issue, and demurrer to equitable plea, as being no answer.

The issues in fact were allowed to be tried first, and defendant obtained a general verdict.

The trial took place at Toronto before Morrison, J., and the equitable plea and the traverse of plaintiffs being the holder of the notes were both left to the jury.

The chief witness for the defence was Smith, the payee. A receipt was proved, dated 20th November, 1862, signed by Robert Ross, by B. W. Ross for him, and by the plaintiff personally, setting out the notes, and that they were received by the Rosses as collateral security for money loaned by Robert Ross to Smith, and for endorsements by B. W. Ross for him. There was no dispute about this.

Smith deposed that he had discharged the liabilities of plaintiff for him, and prove the mortgage by R. Ross for

him, and that he had paid all the moneys due on this mortgage up to bringing the suit, but not at the exact times appointed. He said he dealt with Robt. Ross through the present plaintiff, his general agent; that he (Smith) was not pressing defendant for payment, and the suit was brought without his consent; that he did not make any bargain that defendant was to be sued on the notes, nor did he pretend to control them; that plaintiff had no right in his own behalf to sue these notes; that he thought the plaintiff held them to secure himself and his father, and he had, as agent for his father, the right to hold them until the mortgage was paid; that he supposed plaintiff was his father's agent still.

Another witness proved admissions of plaintiff as to holding these notes as collateral security for his father's mortgage, and negotiations with him as his father's agent. Many letters were also proved from the defendant to plaintiff respecting these notes, sometimes sending money, asking for time, and excusing delay in payment.

It was objected, for plaintiff, that the equitable plea was not proved, or, at all events, not in all its allegations, nor the third plea, denying that plaintiff was the holder.

The learned Judge left both pleas to the jury, reserving leave to plaintiff to move to enter a verdict for him on the equitable plea, if the Court should be of opinion that he should not have left it to the jury.

The jury found for defendant, stating they did not think plaintiff was the lawful holder of the notes.

McCarthy obtained a rule against the verdict, pointing out the various points in which the proof was defective; and for misdirection in holding there was evidence on either of the issues; also on the law and evidence; and on an affidavit from Robert Ross, that the plaintiff always acted in these matters for him and with his full authority, and that it was with his full assent the notes were sued in plaintiff's name, if his assent were necessary.

Both demurrer and rule were argued together, *Harrison*,

Q.C., and *Snelling* appearing for the defendants, and citing *Ancona v. Marks*, 7 H. & N. 686; *Story* on Agency, S. 394; Sm. L. C. 4 ed. 97, 307, 310; *Cartwright v. Hatley*, 1 Ves. 292; *Emmett v. Tottenham*, 8 Ex. 884; *Dyson v. Morris*, 1 Hare, 413; *Peacock v. Pursell*, 11 W. R. 835.

McCarthy, contra, cited *Agra, &c., Bank v. Leighton*, L. R. 2 Ex. 56; *Fisher v. Britton*, 26 U. C. 338.

HAGARTY, C. J., delivered the judgment of the Court.

First, as to the goodness of the plea. One test alone would appear to make it bad. Assuming that as yet no default has been made by Smith in meeting the mortgage payments, if he make default hereafter the notes must stand as a security; and if so, an unconditional injunction could hardly issue to restrain their collection by the plaintiff for ever. We see no valid reason assigned why the maker (Tyson) should not pay his notes at maturity, leaving Smith and the Rosses to settle their respective rights between themselves.

When notes of a third person are placed by the payee in a party's hands, to secure him against accruing liability, we cannot see how that person can be heard urging, as a reason for not paying at maturity, that as yet the holder has not had to pay anything for the payee, or that the payee told him that *he* would give him further time for payment. The defendant here is no party to the arrangement between Smith and the Rosses, nor has Smith, on the facts stated, retained in his hands the right to control or enlarge defendant's time for payment.

The point may be thus stated: A makes a note payable to B one year from date. B induces C to become his surety for payment of money two years from date, and gives him, as collateral security, A's note. When the note matures C sues upon it: has B any right to say he shall not do so, because as yet he has paid nothing for him? and can A defend himself on that ground, with the addition that B tells him he may have further time, and objects to his being sued? We think that in such a case the maker of the note has no defence.

In the case before us we think the plea is bad, apart from the objection as to a perpetual injunction not being obtainable. We think that the holder of the notes, for the special purpose set out in the plea, has the right to collect them, and that Smith has no control over them, so as to enlarge or vary the defendants liability to pay them at maturity.

As our opinion is that the equitable plea is bad, it is hardly necessary to consider the defects in the evidence applicable thereto. It was unfortunate for the plaintiff that he should have availed himself of the law to try the truth of the plea before its legal sufficiency was ascertained. Submitting such a plea to a jury always involves the Judge in much difficulty. He may be satisfied the statements are legally insufficient and immaterial to the real right to recover, but he is told to try them, and generally has to submit the whole pleading to the jury and ask them is the plea proved or not. He cannot easily separate one immaterial statement from another, which is only a little less or more immaterial ; and if he experience a difficulty in the matter, what may be expected of the jury ?

We are quite satisfied the jury would not have found for defendant, on the plea denying that plaintiff was the holder, but for the evidence offered and the discussion opened on the equitable plea. It would seem that they must have found as they did, on the idea that it was hard to make defendant pay the notes before Ross was called on to pay anything on the mortgage, and that Smith was willing to give time, and that, as plaintiff personally had been paid his part, that therefore he was not the lawful holder.

On this last traverse we see no ground on which the verdict can be upheld. The notes had originally been delivered to both the Rosses, father and son, to protect both and each. Plaintiff's portion was settled, but he always continued to act as his father's general agent in collecting the notes, receiving money on some of them, and when, on an endorsement in blank, with his father's assent he sued in his own name, we see no objection to such a course.

If this verdict be right, there can be apparently no means of suing negotiable paper in the name of the agent of or trustee for another, who has the actual possession of them throughout for such other.

It is a thing frequently done, and no question ought to be raised as to its legality. *Law v. Parnell* (7 C. B. N. S. 282) is express on the point.

We think the jury should have been directed to find for plaintiff on this traverse, as there was no sufficient evidence to support the plea.

There seems to us to have been a miscarriage in this case and a failure of justice, and that there should be judgment for plaintiff on the demurrer to the equitable plea, and a new trial without costs on the remaining issues.

*Judgment for plaintiff on demurrer, and rule
absolute for new trial, without costs.*

IN RE THE JUDGE OF THE COUNTY COURT OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DUR- HAM.

Division Court—Unsettled account over \$200—Prohibition.

In a suit in the Division Court the plaintiff claimed \$94.88, annexing to his summons particulars of claim, shewing an account for goods for \$384. 23, on which he gave certain credits, which reduced the amount to the sum sued for; but nothing had been done by the parties to liquidate the account, or ascertain what the balance really due was, with the exception of a small amount admitted to have been paid, and a credit of of \$33, given for some returned barrels, but which still left an unsettled balance of upwards of \$300:

Held, that the claim was not within the jurisdiction of the Division Court, and a prohibition was therefore ordered.

N. Kingsmill obtained a rule calling on the junior Judge of the United Counties of Northumberland and Durham to shew cause why a writ of prohibition should not issue to prohibit him from further proceeding on a

plaint, in the First Division Court., of *Simpson v. Keys*, on the ground of want of jurisdiction.

On the summons there was a claim at the foot for £23 14s. 5d. and costs 9s. A particular of claim was annexed, shewing an unliquidated account for goods, \$384.23.

Then came a credit, for cash and barrels returned, of \$252.50, and a balance struck of \$131.75. and again another sum of like nature.....\$36 85

And a balance\$94 88

This account was produced at the trial, the defendant objecting to the jurisdiction.

H. Cameron shewed cause, citing *Myron v. McCabe*, 4 Pr. Rs. 171 ; *Saunders v. Furnivall*, 26 U. C. 119 ; *Higginbotham v. Moore*, 21 U. C. 326.

Loscombe supported the rule.

HAGARTY, C. J., delivered the judgment of the Court.

The jurisdiction of the Division Court is limited to one hundred dollars, and the sum now claimed is under that amount. It is admitted that no act had been done by the parties to liquidate the amount ascertained, or settle any balance as the account really due. The plaintiff admits that he has been paid a certain amount in cash, and about \$33 is credited for returned barrels. The account is chiefly for liquor sold, and the barrels, if returned, were to be allowed for at a fixed rate. No difficulty arises as to this part of the case. It is conceded that such amount might be properly applied at once in reduction of the gross amount, and leaving the whole claim as if originally so much less.

If this amount be deducted, there would still be an account considerably over \$300.

This, as already remarked, has never been reduced to any ascertained balance by act of the parties.

The 59th section of the Division Court Act enacts that "a cause of action shall not be divided into two or more suits, for the purpose of bringing the same within the jurisdiction of a

Division Court ; and no greater sum than one hundred dollars shall be recovered in any action for the balance of an unsettled account ; *nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds two hundred dollars.*"

In *Higginbotham v. Moore* (21 U. C. 326) the debit side of the plaintiff's claim, as first delivered, exceeded £73. In the account the plaintiff, as here, gave credit for £46 15s., leaving a balance of £26 8s. 8d., and he abandoned the excess of £1 8s. 8d. and claimed to recover the £25. The Judge of the Court had given permission to amend this statement of claim, and it was accordingly so amended as not to appear to shew an excess of jurisdiction ; but, with reference to the claim, as first delivered, Robinson, C. J., at p. 329, says :—" The plaintiff's claim, as first delivered, in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the Court, according to the 59th section, although the balance claimed was only £25; that is, if the *whole* account is to be taken as an account unsettled, notwithstanding there were among the items two notes, which in themselves were liquidated demands."

This we take to be an authority to govern this case, in which there is not any item on the debit of the nature of a liquidated demand in itself. The whole account shews an unliquidated account, and an unsettled account exceeding two hundred dollars, in the terms of the Act, which, as we think, clearly excludes the jurisdiction of the Division Court over the claim.

We have been referred to *Myron v. McCabe* (4 Prac. & Chas. Reps. 171) before Mr. Justice Adam Wilson, in Chambers, in which case the clause of the Statute is not referred to. If the learned Judge arrived at the conclusion which he did with this clause of the Statute before him, we are unable, upon the best consideration, to concur with him : we think the case comes within the Statute, which is imperative.

The cases which have arisen as to the jurisdiction of County Courts, upon the question whether Superior Court

or County Court costs should be granted, do not, as it appears to us, affect this case ; for the County Court jurisdiction is not limited by any clause similar by the 59th section of the Division Court Act. The County Court jurisdiction is only restricted by the amount sought to be recovered. Such was the case also with the Division Court Act of 1841 (4 & 5 Vic. ch. 3), referred to by Burns, J., in *McMurtry v. Munroe* (14 U. C. at p. 171).

The case before us appears to come within the very words of the Statute: "the unsettled account in the whole exceeds two hundred dollars," and this appears to us to conclude the matter.

Rule absolute.

MCWHIRTER, ASSIGNEE, v. THORNE.

Insolvency—Assignment of policy of assurance to creditor—Validity—27 & 28 Vic. ch. 17, sec. 8, sub-secs. 4, 5.

To avoid a transaction under the 4th sub-sec. of sec. 8 of the Insolvent Act of 1864, not only must there be a contemplation of insolvency, but coupled with it a fraudulent preference of the creditor, to whom the transfer or payment is made, over the other creditors.

In this case the insolvent, about two months before the issue of a writ of attachment against him and his assignment consequent thereupon, assigned to defendant, a creditor, a policy of insurance upon certain merchandise, in security for a debt which was about to be placed in suit, and the insurance company, upon the occurrence of a fire, paid over the proceeds of the policy to the creditor, to the extent of the debt secured thereby. At the trial the plaintiff, who claimed, as assignee, to recover back this amount, called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency; that his intention was, with his remaining assets and the residue of the moneys derived from the policy, after paying defendant, to re-open his business, but that he was driven into insolvency by the act of a certain creditor, who, though he had promised him time, sued out a writ of attachment against him:

Held, that the onus being cast upon the plaintiff of proving that the transfer of the policy was made by the debtor in contemplation of insolvency, (it not having been made within thirty days of the issue of attachment or of the execution of the deed of assignment,) the evidence produced by him failed to establish this fact, and that the verdict, therefore, in favour of the defendant was right

Held, also, that there was no fraudulent preference here, it not being urged or pretended, much less proved, that the assignment of the

policy was the spontaneous act of the debtor, but it being a fair inference from the evidence that it was made in consequence of a demand of the creditor, who was pressing for payment of his debt.

Held, also, that sub-sec. 5 of sec. 8 clearly did not apply to this case, the money received by the defendant not having been a payment by the debtor unable to meet his engagements in full, but having been received under the assignment of the policy, and from the insurance company; that the assignment being valid it was quite immaterial whether, when the money was paid by the company, the defendant did or did not know of, or had or had not probable cause for believing in, the then validity of the insolvent to pay his debts in full.

Action by the assignee of James Gunn and John Rutherford, insolvents, to recover back the sum of \$370.88, paid by insolvents to defendant.

The first count of the declaration stated, in substance, that prior to the month of November, 1866, Gunn & Rutherford had been in partnership, which partnership was then dissolved, and that thenceforth Gunn carried on business alone at Ingersoll, with the stock in trade of the late firm; that he effected a policy of insurance upon it with the Commercial Union Fire Insurance Company; that on 14th January, 1867, the stock was destroyed by fire; that after the fire, the firm of Gunn & Rutherford, being indebted to defendant, &c., and being insolvent, or on eve of insolvency, and unable to pay in full, as defendant well knew, or had reasonable or probable cause for knowing or believing, Gunn, in contemplation of insolvency, and on 17th January, 1867, assigned to defendant the policy of insurance, as *security* for payment of \$370.88, due by Gunn & Rutherford to defendant, whereby defendant obtained an unjust preference over the other creditors of Gunn & Rutherford; that while defendant was assignee of said policy, and on 12th March, 1867, Gunn & Rutherford, being so indebted and insolvent, or on eve of insolvency, and unable to pay in full, as defendant well knew, or had reasonable, &c., and in contemplation of insolvency, caused said Insurance Company to pay out of moneys in said policy mentioned, \$370.88 to defendant in payment and satisfaction of Gunn & Rutherford's debt to him, whereby defendant obtained an unjust preference over other credi-

tors, and Gunn and Rutherford afterwards, and within thirty days after such payment, and on 25th March, 1867, executed a deed of assignment in insolvency to plaintiff, an official assignee, whereby an action accrued, &c.

The second count alleged that on 16th March, 1867, Gunn & Rutherford being indebted, &c., and insolvent, or on eve of insolvency, and unable to meet their engagements in full, as defendant well knew, or had reasonable, &c., Gunn paid to defendant \$370.88 in payment of said debt; that no valuable security was given up in consideration of such payment; that said Gunn & Rutherford afterwards, and within thirty days, and on the 25th March, executed an assignment in insolvency to plaintiff as such official assignee, whereby, &c.

The third count was for money paid; money lent; money received; and for interest.

Pleas:—1stly. (To first count), a denial of the assignment of policy and of the payment of the money in contemplation of insolvency.

2ndly. (To second count), denying payment to, and receipt by, defendant of \$370.88, as alleged.

3rdly. (Second plea), denying defendant's knowledge, when he received the \$370.88, or reasonable or probable cause for knowledge or belief, that Gunn and Rutherford were unable to pay in full.

4thly. (Third plea), that defendant gave up, in consideration of \$370.88, a valuable security, namely, a policy of insurance, which Gunn had assigned to him in security.

5thly. (To third count), never indebted.

Issue, on first, second, third and fifth pleas, and replication to fourth plea, that after the fire in first count mentioned, and while the company remained liable to pay amount insured, and on 17th January, 1867, Gunn assigned policy to defendant, setting forth the same circumstances and allegations as in the first count contained.

Issue.

The case was tried, before Hagarty, C. J., at Woodstock, in March, 1868.

At the trial the insolvent, James Gunn, was called as a witness by the plaintiff, and he swore that the partnership between Rutherford and himself was dissolved on the 3rd December, 1866; that he purchased all Rutherford's interest in the stock in trade; that about 8th or 9th December he insured the stock; that on 14th January a fire damaged and destroyed stock to the value of \$1450.00; that there remained after the fire stock to the value of about \$480.00; that about 18th or 19th January, 1867, he assigned the policy to defendant to secure him his debt, which was in the hands of his solicitor for suit; that on the 16th March one McInnis, a creditor of the firm, who had verbally promised to give him time, issued an attachment, and in consequence Rutherford and he, on the 25th March, executed an assignment in insolvency, which was produced; that at the time of assigning the policy to defendant he had no contemplation whatever of insolvency, but that his intention was, with the money to be received from the policy, and with the stock saved and the amount of book debts due him, to renew his business; and that such was his intention he communicated at the time to McInnis's agent, which the agent confirmed. He also swore that it was the attachment issued by McInnis which alone drove him into insolvency. Neither the policy nor the assignment was produced at the trial, nor did there appear to have been any notice served to produce. Gunn swore that he never had it since the assignment to defendant. The agent of the defendant's attorneys, who held the policy for defendant, proved that he received from the insurance company the sum of \$370.00, and that plaintiff, as assignee, received the residue of the moneys paid under the policy through the sheriff, who received it from Gunn & Rutherford under the writ of attachment, and that the policy had been given up, on payment being made by the company. The amount received on the policy by the plaintiff was nearly \$1100.00.

The defendant's counsel moved a non-suit, upon the ground that no legal evidence had been given of the policy

or of its assignment, and that there was no evidence of its having been assigned in contemplation of insolvency; and that the evidence shewed that the \$370.00 was not paid to defendant by Gunn, but by the company, in virtue of the assignment, which was shewn not to have been executed within thirty days of the assignment or of the writ of attachment.

Leave was reserved to defendant to move to enter a non-suit upon these grounds, and the case was left to the jury to say whether defendant was a creditor who had received a valuable security, whereby he obtained an unjust preference over other creditors from the debtor in contemplation of insolvency.

The jury found for defendant.

In Easter Term last, *Harrison*, Q. C., obtained a rule to set aside the verdict and for a new trial, on the law and evidence, the transfer of the policy of insurance being as against plaintiff void, and the payment received by the defendant thereunder, which was within thirty days next before the execution of the deed of assignment or the issue of the writ of attachment, being money which the plaintiff was entitled to recover in this action, as assignee of the insolvent, acting on behalf of the general body of creditors, &c.

M. C. Cameron, Q. C., now shewed cause, citing Insolvent Act of 1864, s. 9, ch. 8, sub-secs. 4, 5; *Newton v. Ontario Bank*, 13 Gr. 62; *Thomson v. Freeman*, 1 T. R. 155; *Smith v. Paine*, 6 T. R. 152; *Hartshorn v. Slodden*, 2 B. & P. 582; *Crosby v. Crouch*, 11 Ea. 256; *Lee v. Hart*, 10 Ex. 555; *Bank of Toronto v. McDougall*, 15 C. P. 475; *Tuer v. Harrison*, 14 C. P. 449.

Harrison, Q. C., contra, cited *Stewart v. Moody*, 1 C. M. & R. 777; *Seibert v. Spooner*, 1 M. & W. 714; *Smith v. Cannan*, 2 E. & B. 45; *Stanger v. Wilkins*, 19 Bea. 626; *Ex p. Bailey*, 3 DeG. M. & G. 534; *Woodhouse v. Murray*, L. R. 2 Q. B. 635; *Bills v. Smith*, 12 L. T. N. S. 22, S. C. 6 B. & S. 314; *Gibson v. Matchett*, 3 M. & G. 138.

GWYNNE, J., delivered the judgment of the Court.

The only objection to the verdict which is involved in this rule is one arising under the 4th sub-section of the 8th section of the Insolvent Act. Reference was made in the argument to the 5th sub-section, but that sub-section clearly does not apply, for the money received by the defendant, in virtue of the assignment of the policy from the insurance company, was not a payment then made by the debtor unable to meet his engagements in full: the payment was made by virtue of the assignment of the policy, and was made by the insurance company; so that, if the assignment of the policy to the defendant was a good assignment, to secure payment to him of the \$370.00, it is immaterial whether, at the time of the payment of the money by the insurance company, the defendant knew or did not know of, or had or had not probable cause for believing in the then inability of Gunn & Rutherford to meet their engagements in full. There was no attempt made at the trial, nor was any evidence offered, to charge the defendant with any such knowledge or probable cause for belief at the time of the assignment. We cannot see, then, how even the open and notorious insolvency of Gunn & Rutherford, if such could be established at the time of the payment being made by the insurance company, could effect the validity of a transaction completed about two months previously. The knowledge, then, of the defendant, at the time of his receiving payment, or his having or not having probable cause for believing, that Gunn & Rutherford were unable to pay their debts in full, forms no element in the consideration of this case.

The 4th sub-section of the 8th section of the Insolvent Act provides that "if any sale, deposit, pledge or transfer be made by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any goods, effects or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the

other creditors, such sale, deposit, pledge, transfer or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee in any Court of competent jurisdiction ; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment, under this Act, it shall be presumed to have been so made in contemplation of insolvency." It may, I think, be admitted that, if the assignment of the policy of insurance can be avoided under this section, although not made within thirty days of the issue of the writ of attachment, or the date of the deed of assignment, the money received by the defendant, in virtue of such avoided assignment, can also be recovered back as the fruit of this void assignment ; but, inasmuch as the assignment of the policy of insurance was not made within thirty days of the issue of the writ of attachment, or the date of the deed of assignment, the onus is cast upon the plaintiff of proving that the transfer was made by a person in contemplation of insolvency.

For this purpose the plaintiff called the debtor, Gunn, who assigned the policy, and he distinctly swears that at the time that he assigned it he had no contemplation whatever of insolvency ; that his intention was, with his remaining assets and the moneys arising from the policy, remaining after payment of the \$370.00 to the defendant, to re-open his business, and that he was driven into insolvency by the act of his creditor, McInnis, issuing the writ of attachment, notwithstanding that he had, as Gunn alleges, agreed to give him time for the payment of his debt. In the face of this evidence we cannot see how the plaintiff could expect that the jury could arrive at any other conclusion than that the assignment of the policy was not made by Gunn in contemplation of insolvency.

The terms "insolvent" and "insolvency," in the Insolvent Act of 1864-5, are, as appears to me, equivalent to the terms "bankrupt" and "bankruptcy" in the English Acts. There is no difference here between insolvency and bankruptcy, as there is in England. The whole object of our

Act, as that of the Bankrupt Acts in England, is to provide for the ratable distribution of the estate among the creditors. The term "*contemplation*" of insolvency, therefore, under our Act, must receive the construction of the term "*contemplation*" of bankruptcy under the English Acts. The meaning, then, of the term "*in contemplation of insolvency*," used in the Insolvent Act, must, I take it, be held to be that the act assailed must be done with the intent of defeating that general distribution of effects which is provided for by the Act: *Morgan v. Brundrett* (5 B. & Ad. 296); *Abbott v. Burbage* (2 Scott 662); *Atkinson v. Brundall* (2 Bing. N. C. 225). What the law desires to guard against is, a debtor, unable to meet his engagements in full, doing any act in contemplation of a fraud upon the Insolvent Act; but a man can only contemplate a fraud upon that Act when he contemplates defeating the distribution provided on his having recourse to the Act, as was said by Bosanquet, Judge, in reference to contemplation of bankruptcy, in *Atkinson v. Brundall*.

To avoid a transaction under the 4th sub-section of the 8th section, not only must there be such a contemplation of insolvency, but also, coupled with that, a fraudulent preference of the creditor, to whom the transfer or payment is made, over the other creditors. The words, "given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an *unjust* preference over the other creditors," mean, in my judgment, no more than a transfer or payment made by way of fraudulent preference to one creditor over the others: *The Bank of Australasia v. Harris*, in the Privy Council (6. L. T. N. S. 115, and 8 Jur. N. S. 181).

The test, to determine whether a transaction is void under this section, is precisely the same as is applied under the English bankrupt law to determine whether a transaction is void, as being by way of fraudulent preference.

In the argument it was contended that the mere fact of preference was sufficient. If that were so, the term "*unjust*" in the Act, in context with "*preference*," would be without meaning.

This sub-section of the Act is, in my judgment, only aimed at those transactions which are well known to the law under the appellation of acts of fraudulent preference. Now, in this case, it was not urged or pretended that, nor was there any evidence offered that this assignment emanated from the mere will of the debtor, without any demand or request of the creditor. It is rather to be inferred from the evidence that it was made in consequence of a demand by the creditor, who, as I understand the case, had placed his claim in the hands of his solicitors for collection; and that a mere demand or request, even without suit, would be sufficient to protect the transaction from the stain of a fraudulent preference is established by several English cases: *Brown v. Kempton* (19 L. J. C. P. 169); *Strachan v. Barton* (11 Exch. 647); *VanCasteel v. Booker* (2 Exch. 691); *Mogg v. Baker* (4 M. & W. 348); *Edwards v. Glyn* (2 El. & El. 29).

It is the intention of defeating the operation of the Insolvent Act which alone will constitute a fraudulent preference: a payment or transfer made in the absence of such a motive, though its necessary consequence be to prevent, *pro tanto*, a ratable distribution of the insolvent's effects, is valid: *Bills v. Smith* (11 Jur. N. S. 155).

But upon the evidence, as presented to the jury, the verdict is clearly right, and the rule must be discharged with costs.

Rule discharged, with costs.

McCLARTY V. McCLARTY.

Agreement to divide land—Repudiation—Indebitatus assumpsit for work and labour.

Defendant agreed with his son that if he would remain and work with him, so as to assist in paying for a lot of land which he had purchased, he should be paid for his services by the property being divided with him. The son accordingly remained, worked upon the land for several years, and died. After his death defendant stated that he "had a conversation in his family, and he and his wife agreed to buy the land, keep the family together, and, when the land was paid for, divide the property among his sons :"

Held, that neither this conversation, nor a subsequent offer on defendant's part to pay plaintiff, as administratrix of the son, \$800, in satisfaction of the action, amounted to a repudiation or rescission of the only bargain between the father and son, which was to divide the land, and that, therefore, *indebitatus assumpsit* for the son's work and labour would not lie.

Declaration for work and labour.

Plea—Never indebted and Statute of Limitations.

A verdict was taken for plaintiff, subject to the award of an arbitrator, to whom the cause and all matters in difference were referred, the arbitrator to state a case for the opinion of the Court, at the request of either party, on any point of law that might arise. This was the consent at the trial, and the order of reference was to the same effect.

The arbitrator made an award, and, by request of counsel, stated a case thus : 1st. Whether plaintiff, as administratrix, under the facts proved, had any such cause of action as was set forth in the declaration. 2nd. If such cause existed, was it to any extent barred by Statute of Limitations ?

He found the facts to be as follows : Deceased, up to 1857, worked with his father, a farmer, as a member of his family, having no agreement as to wages. He was then 22 years old, and being about to leave home, defendant, his father, who already owned a farm of 200 acres, bought another lot of 100 acres, paying part down and the rest on a term of years credit, and it was agreed that if deceased would remain and work, so as to help to pay

for the land, he should be paid for his services by the property being divided with him.

Deceased consequently remained working without wages from then till December, 1861, when he married. He used, during that time, to work on his own account about three months every year, at a threshing machine. From his marriage to his illness, in March, 1866, he worked constantly for defendant, on either farm, as defendant required, living with his family on the last purchased land, and his house being supplied from the farm produce. He died in December, 1866.

Since his death defendant stated "that he had a talk in his family, and he and his wife agreed to buy the last 100 acres, keep the family together, and when the land was paid for, divide the property among his sons." On another occasion he said, that he intended, as a remuneration for Dugald's work, to give him a share of the property, and now that he was dead, he would give it to his children; that he had offered deceased and his wife the land they lived on, if they would pay the balance of the purchase money, and deceased refused it, (the amount due not being in evidence), and since deceased's death defendant offered plaintiff \$800 in satisfaction of the action.

The lot had been paid for, but half the required amount was raised by defendant, by mortgage on it and other property, his whole property being encumbered to the extent of \$2,500.

R. A. Harrison, Q. C., appeared for the plaintiff.

M. C. Cameron, Q. C., contra, cited *Hoskins v. Mitcheson*, 14 U. C. 551.

HAGARTY, C. J., delivered the judgment of the Court.

This case comes before us in rather a peculiar shape. The referee was to find the facts, and to state any questions of law for the Court. He has stated certain facts, but drawn no conclusions, and inferred nothing from them. We are not asked to draw any inferences from the matters

stated. In the manner in which the case comes before us, it seems to me that we must see if the facts stated necessarily entitle the plaintiff to recover. We are not, as I understand it, to do more than express the legal import and significance of the facts stated.

If an action of *indebitatus assumpsit* lie on these facts, plaintiff is entitled to recover.

There is certainly no contract, express or implied, on the part of defendant, to pay money to deceased for his work and labour. The only bargain or agreement proved was to divide certain land with him. It was frankly admitted, on the argument, in plaintiff's behalf, that unless it could be shewn that defendant had done some act shewing a repudiation or rescission of the original bargain, there could not be a recovery, and all that her counsel could point to in support thereof was defendant's assertion that "he and his wife agreed to buy the last 100 acres, keep the family together, and, when the land was paid for, divide the property among his sons." I see no meaning to be attached to this expression, unless we consider it as spoken prior to the buying of this land, and prior to the contract with deceased; or, if spoken afterwards, then, as giving a different version of the original bargain. It seems impossible to consider it as a repudiation of the alleged bargain.

In the absence of direct proof of a repudiation on defendant's part, I think we cannot, in any view of the case, hold that *indebitatus assumpsit* can be maintained. The defendant can justly say that he never promised to pay or was liable to pay money. He may be ready to carry out the original bargain, and we cannot say that he will set up the Statute of Frauds or other technical defence. The case cited (*Hoskin v. Mitcheson*, 14 U. C. 551) is in point. Goods were sold as so much cash paid by plaintiff on account of some lots of land, which defendant had verbally agreed to sell to plaintiff, and which he declared he was ready to convey as agreed. Plaintiff contended that, as the bargain was void under Statute of Frauds, he could sue for the price in money.

Sir J. Robinson said: "No implied assumpsit arose to pay for them in money. It is quite true the plaintiff seems to hold no valid contract from defendant to convey him these lots—nothing that he can enforce; but that is his own neglect. If plaintiff had called upon defendant to execute an agreement and he had declined, or had tendered a balance of purchase money, and applied in vain for a deed, he might, no doubt, have sued for the value of his goods in money; but he has no right to assume that defendant will disregard the verbal agreement, because it is not binding in law, and, without putting him to the proof, treat him as if he had done so."

There is nothing before us which entitles us to say that defendant has repudiated the verbal bargain. His offer to pay \$800 in satisfaction of the action does not prove this. Much may be urged by him; that the paying of the land was to be the joint work of deceased and of himself; that defendant and his family had lived years on it, deriving benefit from it, and that, in fact, it was not yet paid for by their joint exertions.

I think we are bound to say that the action fails, on the materials before us. As far as can be judged from the evidence, it would seem a most unfortunate thing that the offer made for a settlement was not accepted.

Judgment for defendant on special case.

MURRAY V. DAWSON.

Natural watercourse—Evidence—C. S. U. C., ch. 57.

Held, that the evidence given in this case and set out below failed to establish a natural watercourse, and that the plaintiff's only remedy was under C. S. U. C. ch. 57.

The first count of the declaration stated that the plaintiff was possessed of lot number one, south east boundary of the township of Usborne, and was by reason thereof entitled

that the surface and other waters collecting upon plaintiff's land should run and be drained and carried off from the plaintiff's land through a certain drain, watercourse, channel, gutter, natural flow, course, or watershed, though the lands of the defendant, adjoining the plaintiff's land; yet that the defendant wrongfully stopped and obstructed the said drain, watercourse, &c., whereby divers large quantities of water, which otherwise would have flowed through such drain, watercourse, &c., &c., were penned back upon the plaintiff's lands and his crops damaged.

To this count the defendant pleaded not guilty.

2nd. That the plaintiff was not and never was entitled to have the surface and other waters accumulating on his lands drained and carried off through any drain, watercourse, &c., &c., on the lands of the defendant.

3rd. That there never was any such drain, watercourse, &c., &c., running from the plaintiff's lands through the lands of the defendant, as in the first count alleged.

Issue.

The declaration contained a second count framed under 22 Vic. ch. 57, which, in Michaelmas Term, 31 Vic., had been held to be bad, upon demurrer, as setting out an award which did not fix the time each party should have within which to perform his share of certain ditching awarded to be made, and for other reasons. The case is reported in 17 C. P. 588.

The issues joined on the first count were tried before Richards, C. J., at Goderich, in March, 1868.

The plaintiff's witnesses swore that a swale, situate in low ground between high banks, extended for some distance above and through the plaintiff's land into and through and below the defendant's lands; that the natural inclination of the ground was across plaintiff's lot 15 feet, and across defendant's 12.85 feet, the swale itself being said to be three rods wide in some places, and only a rod in others; the waters in the swale consisting only of surface water, and the water being in it only in the spring and fall and in summer freshets; the swale becoming narrower as it entered

defendant's land; before the country was cleared there being, as was said, water in it in the summer, but since it had been cleared there being then none in summer, except from rain; when there was water in the swale the flow was said to be more perceptible in defendant's land than in the plaintiff's; but on either side of this flow the land was wet and damp.

It appeared that plaintiff had dug some rods of a drain on defendant's land, which defendant had filled up, and plaintiff proposed to prove that this drain was dug by the defendant's leave, but this evidence was not received. The only obstruction, if any, was proved by all the witnesses to have been caused by ploughing and harrowing across the low places in dry weather, in the cultivation of the defendant's land, in the ordinary course of husbandry.

At the close of the plaintiff's case a nonsuit was moved and leave was reserved to the plaintiff to move, in term, to enter a nonsuit upon the following grounds:—

1st. That the evidence failed to establish any stream or watercourse, for interference with which the plaintiff had any right to maintain an action; that the adjacent proprietors could have no riparian rights in water such as this was proved to be.

2nd. That the only obstruction, if any, proved consisted in the defendant ploughing his land in the ordinary course of husbandry; and

3rd. That the evidence shewed that the plaintiff's remedy was under 22 Vic. ch. 57.

The defendant called witnesses, who swore distinctly that there was no stream or watercourse, but a swale or watershed, the waters of which in fall and spring freshets escaped along the natural inclination of the ground into a creek further down than the defendant's land.

The case, therefore, depended wholly upon the evidence of the plaintiff's witnesses. The learned Chief Justice left it to the jury to say whether there was a watercourse, telling them, at the same time, that they must not view every low place where water ran as a watercourse,

which the owners of the land were obliged to leave uncultivated.

The jury, however, found it to be a watercourse and they rendered a verdict for the plaintiff and 5s. damages.

In Easter Term last a rule for a non-suit was moved pursuant to leave reserved, to which *C. Robinson*, Q. C., shewed cause, citing *Broadbent v. Ramsbottom*, 11 Ex. 602, 616, 617; *McGillivray v. G. W. R. Co.*, 25 U. C. 69; *McGillivray v. Millin*, 27 U. C. 62, 70.

Anderson, contra, cited *Ramsbottom v. Taylor*, 11 Ex. 369, 382; *Surry v. Piggott*, Tud. L. C. R. P. 162, *Notes*.

GWYNNE, J., delivered the judgment of the Court.

We think this case is governed by *McGillivray v. Millin*, (27 U. C. 62) and *Crewson v. Grand Trunk R. W. Co.* (27 U. C. 68.)

We are of opinion that the evidence establishes no injury in fact or in law, for which any action lies at the suit of the plaintiff at common law, as for the obstruction of a natural stream or watercourse, whatever cause of action the plaintiff may have, if any, for a wrongful obstruction of, or interference with, any ditch lawfully established under the provisions of 22 Vic. ch. 57. The evidence of the alleged obstruction, in which all the witnesses concur, seems to us to be sufficient to determine this case; for we conceive it to be impossible to hold that to be a natural stream or watercourse which could be obstructed, or that to be an actionable obstruction, which is said to have been caused wholly by the act of ploughing and harrowing his land by a defendant in the cultivation of it, in the ordinary course of husbandry. If such an act can cause to the proprietor of the adjoining land any damage, it must be *damnum absque injuriâ*, for which no action lies. We are not called upon to determine whether the defendant might not render herself liable to an action by the erection of such a construction across the swale, within her own lands, as might, during the period of the freshets, cause to the plaintiff *damnum injuriosum*,

or whether the principles involved in the cases of *McGillivray v. Millin* and *Crewson v. The Grand Trunk Railway Company* would protect her in such a case: for the decision of this case it is sufficient to say that the evidence shews no act in excess of the legitimate use by the defendant of her own lands, for which no action lies. The plaintiff has an abundantly adequate remedy for any real or imaginary injury, to which he is exposed from the natural condition of his land, in the 7th and subsequent sections of 22 Vic. ch. 57. That statute was passed with a special view to such a case as that which the evidence here discloses, and we think that the plaintiff should be left to have recourse to it. This court, in its judgment on the demurrer to the 2nd count, reported in 17 C. P., has already expressed its opinion that this is a proper case for the application of the remedial provisions of that act, although the proceedings taken under it, as disclosed in the second count, do not appear to have been taken in such a manner as to vest a cause of action in the plaintiff. That is a difficulty which can, however, be rectified readily by further proceedings, taken in more strict accordance with the provisions of the act. We are of opinion that the rule must be made absolute for entering a non suit.

Rule absolute to enter nonsuit.

KING V. SMITH.

Insolvency—Annexing schedule to assignment—Omission of debt from schedule—
27 & 28 Vic. ch. 17, s. 9, sub-secs. 3, 10, 11, 12—*Pleading.*

Plea, to declaration on a promissory note, that defendant, being insolvent within the Act of 1864, called a meeting of creditors and duly made an assignment in duplicate under the Statute, and after a year from its date, not having received the statutory consent from his creditors, he duly obtained his absolute discharge from the Judge from plaintiff's and all other debts.

Replication, that plaintiff's name, as a creditor, and the said pro-note and cause of action, were not mentioned in defendant's schedule annexed to his deed of assignment, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate :

Held, on demurrer, replication good ; that it is still necessary, under the Insolvent Acts, to have a schedule of creditors prepared or annexed to the deed of assignment ; and that the effect of the discharge obtained, under the Insolvent Act of 1864, by an insolvent, is limited to the debts and causes of action set forth in his schedule, either originally or by supplement.

To a declaration on a promissory note defendant pleaded that, being insolvent within the meaning of the Act of 1864, he called a meeting of his creditors and duly made an assignment in duplicate under the Statute, and after a year from its date, not having received the statutable consent from his creditors, he duly obtained his absolute discharge from the Judge from plaintiff's debt and all others.

To this plea plaintiff replied that his name as a creditor was not mentioned in defendant's schedule, annexed to his deed of assignment, nor in any supplementary schedule, as required by law, and the debt was never proved against his estate.

This replication was demurred to as no answer.

A. Richards, Q. C., for the demurrer, cited *Bullen & Leake's* Prec. 3 ed. 507 ; *Clapham v. Atkinson*, 12 W. R. 342, 1062 ; *Arch. Bkcty.* II. (ed. of 1862) 1003 ; Insolvent Acts of 1864 & 1865.

K. McKenzie, Q. C., contra, cited *Stephenson v. Green*, 11 U. C. 452 ; *Phillipps v. Pickford*, 14 Jur. 272 ; *Re Parr*, 17 C. P. 621.

HAGARTY, C. J.—It was strongly pressed on us, in argument, that, at all events, in the case of such a discharge as that before us, it was not necessarily confined to creditors specified in a schedule.

It is stated that the insolvent called his creditors together, and at the meeting made an assignment to the official assignee. By sec. 2 of the Act of 1864 he was to exhibit a schedule of creditors, shewing their residences, &c., and the amounts due to each, which schedule was to be sworn to; and when the deed of assignment was executed, a copy of the list of creditors is to be appended to it.

By the Act of 1865 (sec. 2) a voluntary assignment may be made to any official assignee, without the performance of any of the formalities, or the publication of any of the notices, required by sub-sections 1, 2, 3 & 4 of sec. 2 of the Act of 1864. This enabled the debtor at once to make an assignment, without calling a meeting of creditors, or exhibiting to them a schedule at the meeting, or (sub-sec. 2) of sending post notices, or (sub-sec. 3) of creditors at the meeting naming assignee, or (sub-sec. 4), if no assignee be there named, assigning to any solvent creditor to a specified amount, &c.

It was urged that this alteration in the law did away with the necessity of having a schedule of creditors prepared or annexed to the assignment. I do not think such a construction can prevail. Sub-sec. 6 of sec. 2 of the Act of 1864 is not touched. It is the authority which prescribes how the assignment may be made. It refers to a form, C., appended to the Act. It directs "a copy of the list of creditors produced at the first meeting of creditors shall be appended to it;" and the form C. says, "a duplicate of the list of creditors, exhibited at the first meeting of his creditors, is hereto annexed."

As this species of assignment can be made directly without this meeting of creditors, and as, when there is no meeting, there cannot be a copy or duplicate of the list produced at such meeting, it is argued that therefore no schedule or list of creditors is now by law required.

The law, in my opinion, still requires the list of creditors to be annexed to a deed of voluntary assignment: the reference to the list being identical with that produced at a meeting of creditors, that may never have taken place, may, I think, be rejected, when there has been no such meeting, on a principle analogous to that of "*Falsa demonstratio non nocet.*"

When there has been no previous meeting of creditors, the reference thereto can be easily omitted. In the case before us the reference could properly be made, as the plea avers that there was such meeting, and that it was at such meeting that he made his deed of assignment.

Assuming the schedule to be necessarily attached to the deed, we have now to consider the effect of omitting plaintiff's claim therefrom. The insolvent avers that he obtained his discharge, by application to the Judge, a year after the date of his assignment, without having obtained the consent of creditors. He therefore applied under sub-sec. 10 of sec. 9. Sub-sec. 12 enacts that the Judge may make an order either granting the discharge of the insolvent absolutely, conditionally or suspensively, or refusing it absolutely, and such orders shall be final unless appealed from, and sub-sec. 10 allows the application for discharge to be thus made, after a year from the assignment or date of the issue of an attachment, thus extending it to both voluntary and compulsory liquidation.

In cases where attachment issues, of course, there is no schedule furnished by the insolvent, unless he petition under sub-sec. 15 of sec. 3. Then he is to produce a schedule of creditors, &c. A statement of his affairs is to be made by the person placed in charge of the estate: sub-secs. 11 & 21.

It thus appears that a discharge can be obtained on behalf of one against whom an attachment has issued. Under sec. 9 he may procure a deed of composition and discharge pending the proceedings in a voluntary assignment or for compulsory liquidation, and the discharge, which is consented to by such deed, "shall have the same

effect as an ordinary discharge obtained as hereinafter provided ;” and by sec. 10 of the Act of 1865, he may make a voluntary assignment, pending proceedings for compulsory liquidation.

Cases may occur in which the insolvent flies the country and never appears or intervenes in the proceedings. A case may also occur in which the insolvent makes no application to supersede any attachment or compulsory proceeding, and does not obtain a consent of creditors for his discharge, and yet attends the meeting for his examination, under sec. 10, properly answers all questions, and does all that is required of him under the Act, and furnishes no regular schedule of creditors, not having been required so to do, and also does nothing in fact until he applies, under sub-sec. 10 (as the defendant here has done), for his discharge, after a year from the date of the attachment against him. In such a case there would be no schedule, in the words of the sub-sec. 3, “annexed to his deed of assignment,” there being no such deed.

There is, therefore, a difficulty in holding that a discharge, if ultimately obtained, in such a case, from the Judge, would be only applicable to scheduled creditors.

Sec. 9 is that referring to composition and discharge. It allows the making of a deed of composition and discharge after compulsory proceedings, and the discharge therein agreed to shall have the same effect as an ordinary discharge, obtained as hereinafter provided.

Sub-sec. 3 declares :—“The consent in writing of the said proportion of creditors to the discharge of a debtor, after an assignment, or after his estate has been put in compulsory liquidation, absolutely frees and discharges him from all liabilities whatsoever (except such as are hereinafter specially excepted), existing against him and proveable against his estate, *which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge*, and in time to permit the creditors therein mentioned obtaining

the same dividend as other creditors upon his estate, *or which appears by any claims subsequently furnished to the assignee*, whether such debts be exigible or not at the time of his insolvency, and whether direct or indirect; and if the holder of any negotiable paper be unknown to the insolvent the insertion of the particulars of such paper *in such statement of affairs*, with the declaration that the holder thereof is unknown to him, *shall bring the debt represented by such paper and the holder thereof within the operation of this section.*" It is to be noted that this is the only description in the Act of the legal effect of a discharge of the insolvent's debts.

Then, when we proceed to the 10th sub-section of the same section 9, we find the case of the insolvent, who, after a year has elapsed from the date of his assignment or of the attachment, has failed to obtain the consent for his discharge: he may apply to the judge, who, after notice of the application and hearing the insolvent and the objecting creditors, and any evidence that may be adduced, may grant him his discharge, absolutely, conditionally, or suspensively, or refuse it altogether. I think we must read this by the light of the preceding sub-secs. 3 & 5. We cannot, I think, hold it to provide for a more extensive discharge; *e. g.*, for one including the class of debts excepted in secs. 3 & 5; nor for any species of discharge larger than that obtained by consent. It would be a curious result if the insolvent, discharged without his creditors' assent, obtained a larger immunity than the insolvent who had obtained it. It may fairly be read thus: Under sub-sec. 3 a consent of creditors shall work a discharge of the insolvent, which shall have a particular legal effect on certain specified debts. When the consent is not obtained, a discharge, having a like, but not a more extensive effect, may be obtained by the decision of the Judge, after hearing the creditors.

As to the difficulty suggested, where no deed of assignment, with schedule annexed, has been executed, but the insolvent applies for discharge a year after the attachment,

(not having obtained any creditors' consent), I think it can be answered by reference to the sub-sec. 3, already quoted in full, and that the insolvent can and ought to supply such list or schedule of creditors under the words, "which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge."

In such a case there would be a list of creditors prepared by the temporary guardian or subsequent official assignee, and on the examination of the insolvent under sec. 10, or at any other time up to the application for discharge, there would certainly be, in some shape or another, a list or schedule, furnished by, or supplemented and corrected by the insolvent, coming within the construction of the sub-sec. 3.

I think it impossible to hold, in the general construction of the Insolvent Acts, that a discharge was contemplated to be allowed to a debtor of the whole amount of his obligations, unspecified by or not set forth in some authentic document, advanced or adopted by him as the true list of his liabilities.

In the case before us it is admitted, on the Record, that the defendant did make an assignment, to which, as before mentioned, I think there should have been a schedule of debts attached; and the defendant admits, by his demurrer to the replication, that the debt sued for is not mentioned in the statement of affairs annexed to the deed of assignment, nor shewn by any supplementary list of creditors furnished to the assignee. It thus appears that the course adopted by the insolvent, to obtain the benefit of the Act, involved his making an assignment and filing therewith a proper schedule of liabilities, and I am of opinion that the effect of the discharge obtained by him, under sub-secs. 10, 11, & 12, is no greater than is prescribed by sub-sec. 3, and is limited to the debts and causes of action set forth in his schedule either originally or by supplement.

I look upon the existence of a properly drawn schedule of liabilities, binding on the insolvent, as a matter of the highest importance to the due working of the insolvent

laws, and can hardly conceive the case of a discharge being obtained in the absence of such a document.

I can hardly be persuaded that the Legislature contemplated any more extensive discharge to a debtor than a release from certain duly stated claims upon him; claims, of which all those interested in the administration of his estate should have full notice.

Such a view of the law works no hardship on debtors, full opportunity being allowed to them under this Act to correct any previous error in their schedules. It is useless to dwell upon the frauds that might be perpetrated on creditors, and the insecurity and looseness which must pervade all dealings with the estate of an insolvent, were it once established that he was not bound by any regularly filed schedule, or that he could even expect to obtain a discharge from any liabilities not fully exhibited to his creditors, and open to their inspection at all times.

The Act might, certainly, have been worded with more exactness, and it would be well perhaps for the Legislature to define more precisely the general effect of any discharge allowed by the Act.

I think the plaintiff should have judgment on the demurrer.

GWYNNE, J.—The plea avers the execution by the defendant of a voluntary deed of assignment in insolvency under the Act of 1864 and prior to the passing of the Act of 1865. To that deed there must have been annexed by the insolvent a schedule of his creditors. It is admitted that the plaintiff's name or debt is not inserted in this list, or in any supplementary list furnished by the insolvent, as required by the Act, and that the plaintiff's claim was never proved against the estate. A discharge under the Act can only have any effect in the circumstances and to the extent provided by the Act. Save in so far as is provided by the Act, the insolvent must remain liable to pay all his creditors their debts in full, if they fail to realize them out of the estate surrendered in insolvency.

The first sub-section of the ninth section provides for a discharge contained in a deed of composition, and enacts that "a discharge therein agreed to shall have the same effect as "*an ordinary discharge obtained as hereinafter provided.*" The only clause of the Act which gives any effect to any discharge is the third sub-section of the ninth section, which provides for a discharge by the consent in writing of the creditors. This discharge must, therefore, be that discharge which in the first sub-section is referred to as "the ordinary discharge obtained as hereinafter provided." The effect of this discharge is declared to be, absolutely to free and discharge the insolvent from all liabilities whatsoever, except such as are specially excepted, existing against him and proveable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee, whether such debts be exigible or not at the time of his insolvency, and whether direct or indirect.

This section provides equally for voluntary assignments and for a consent after the estate is put into compulsory liquidation.

The tenth sub-section of the ninth section provides for the Judge granting to the insolvent *his* discharge after the expiration of a year from the date of the voluntary assignment, or from the date of the issue of the writ of attachment in compulsory liquidation, in case the insolvent has not within that period obtained *it* by the consent of his creditors; but as a discharge, when granted, has no effect under the Act but that declared in sub-section 3, it is plain that the discharge obtained from the Judge under the tenth sub-section can have no greater effect than that obtained under sub-section 3.

It has been argued that in compulsory liquidation there is no such list as any of those mentioned in sub-section 3,

and that therefore, unless a Judge's discharge frees an insolvent in compulsory liquidation from all his liabilities named or not, such an insolvent could obtain no discharge. If that were so, the answer would seem to be that the Act is defective in not giving to an insolvent in compulsory liquidation that benefit from a discharge which the third sub-section would seem to contemplate giving to him. However, the contention does not appear to me to be well founded ; for

1st. There is nothing to *prevent* an insolvent in compulsory liquidation furnishing the assignee with a list of his creditors.

2nd. If he neglects doing so, he may, under the tenth section, be examined, and it is the duty of the assignee to summon him to be examined on oath, and then the list can be required of him ; and

3rd. By the third sub-section of section 9 the discharge in compulsory liquidation is declared to bar all debts, "which appear by any claim subsequently furnished to the assignee," which would seem to point to the case of claims presented by creditors whose names do not appear in any list furnished by the insolvent. Now, I see no hardship in holding that the Legislature did not contemplate discharging an insolvent (if he should abscond from the Province, and evade examination under the statute, or if he should not avail himself of the privilege of presenting a list of creditors, or should in a presented list suppress certain of his debts), from all liability in respect of debts which have neither been entered by him in any list furnished, or proved against him upon claims made by the creditors themselves. However, in this case there must have been a list. The insolvent executed a volutary assignment. He did not name, in the list furnished, the plaintiff's debt, nor did the plaintiff present his claim to the assignee ; consequently the plaintiff has received no benefit from the assignment, and the insolvent has failed to bring the plaintiff's claim within that class, as an exemption from liability in respect of which the statute declares that the discharge shall operate.

WILSON, J., concurred.

Judgment for plaintiff on demurrer.

CROMIE V. SKENE.

Seduction—Parent resident abroad—General issue—Right to maintain action.

Held (Hagarty, C.J., *dissentiente*), that the parent may maintain an action for the seduction of his daughter, though resident abroad at the birth of the child, and a cause of action at common law vested in a master, whom she served.

Held, also, that the question may be raised by the defendant under a plea of not guilty.

SEDUCTION of plaintiff's daughter and servant.

Plea—Not guilty.

At the trial at Cobourg, before the Chief Justice of this Court, it was proved that plaintiff's daughter lived with defendant's father, at whose house the intercourse took place, followed by the birth of a child; that the plaintiff and his wife had for some years resided out of Upper Canada.

The action was commenced within six months from the birth of the child.

It was objected for defendant that the action did not lie, as the parents lived abroad, and the cause of action, therefore, vested in the master, and the Statute did not apply.

Leave to move to enter nonsuit was reserved, and plaintiff obtained a verdict.

In Michaelmas Term last, *Armour*, Q.C., obtained a rule on the leave reserved, to which *C. S. Paterson* shewed cause, objecting, firstly, that this question could not arise on "not guilty" only as that plea merely, denied the act, not the inducement; that this had been expressly held in *Alteman v. Smith*, 4 C. P. 500; that in *Lake v. Bemiss*, 4 C. P. 430, S. C. 3 Pr. Rep. 359, the declaration was held bad, because it was not alleged that the seduced was the servant; and in the subsequent report of the case the application to add a plea, denying she was the servant, was refused; that a similar plea was held bad in *McLeod v. McLeod*, 9 U. C. 331. He also referred, on this point, to *Nickells v. Goulding*, 21 U. C. 366; *McIntosh v. Tyhurst*, 24 U. C. 443; *Green v. Wright*, 24 U. C. 245.

Then, as to the main point, whether the action would lie at all, the father being non-resident at the birth of the child, he contended that it would, citing C. S. U. C. ch. 77, secs. 1, 3, and *Kirk v. Long*, 7 C. P. 363, which he contended was somewhat like this case, only there the master was himself the seducer, while here the son was the guilty party.

Armour, contra, argued that the case of *Heeley v. Crummer*, 11 C. P. 527, shewed that it was not necessary to deny the service, as did also the cases of *Smart v. Hay*, 12 C. P. 528; *Eager v. Grimwood*, 1 Ex. 61, and *Grinnell v. Wells*, 7 M. & G. 1033. He also contended that the Statute must be read altogether, and that the parent's right was only given while in the country, and provided he sued within six months after the birth; that the two cases in the Court of Common Pleas, as well as *Cross v. Goodman*, 20 U. C. 242, shewed that whenever the right vested in the father, and he did not sue within six months, in his lifetime, neither mother nor master could sue after his death. *Kirk v. Long*, he stated, went off on a different point, and *McIntosh v. Tyhurst* decided that two actions were not maintainable for the same wrong; while in *Whitfield v. Todd*, 1 U. C. 223, it was held that the right of action was taken away from the master for six months, the parent being in the country, because, until the expiration of that time, it vested in the latter; and, finally, that *Hicks v. Ross*, 25 U. C. 50, shewed that a liberal construction was not to be given to the Statute.

HAGARTY, C. J.—It seems established in the cases that, to an action by the father, a plea, denying that the daughter was his servant, cannot be pleaded: *McLeod v. McLeod* (9 U. C. 331).

In *Heeley v. Crummer* (11 C. P. 527) the seduction had taken place and child born in father's lifetime, and he sued out a writ and then died. The mother brought the action and obtained a verdict. Not guilty only was pleaded. On leave reserved, a rule was made absolute to enter non-

suit. Draper, C. J., says :—" It is obvious, on reading the evidence, that the defendant could not deny the relation of parent and child to exist. * * * Neither, according to *McLeod v. McLeod*, can he plead that the daughter was not, when, &c., the servant of plaintiff. * * * Without absolutely deciding that the defendant had a right to raise this question, and give the necessary evidence for that purpose, under a plea of not guilty (though such is my present inclination), I think the plaintiff should not be allowed to succeed, on the ground there was no fitting plea, when no such objection was raised at the trial, and when the facts, on which the defence rests, were either admitted or were proved by the plaintiff's own witnesses;" and when, if objection made, an application to add a plea would probably have been successful, as it could not prejudice the defence, and could merely raise the true legal objection.

In the case before us the facts all came out, without objection, on the evidence of the daughter: defendant called no witnesses.

In *Smart v. Hay* (12 C. P. 528), on a somewhat similar state of facts, after verdict for plaintiff, a nonsuit was entered on leave reserved, although the objection was pressed that not guilty only was pleaded. I think we must here hold the exception is open to defendant, on the authorities, and on the manner in which the evidence comes before us. The action is on the Statute, and could not be maintainable without its aid, and if the plaintiff's own evidence in chief shew it not to be maintainable thereunder, it seems difficult to hold that the objection is not open to defendant.

We have, therefore, to consider the main question. Mr. Armour's point may be thus stated: The plaintiff, being resident abroad when the grievances were committed, is debarred from suing, if a cause of action for the seduction be vested by the common law in the master of the girl, although the master has never sought to enforce his claim.

Cross v. Goodman (20 U. C. 242) was an action by the

master. Plea, that within six months of the child's birth, the mother (resident in Upper Canada) of the girl had brought an action. Replication, that after verdict obtained by the mother, on application of defendant, a new trial was granted, before which the mother died and suit abated, and plaintiff was then and now entitled to sue at common law. Demurrer, and judgment for defendant. Sir J. Robinson, C. J.: "In the case before us the mother of the girl seduced, being resident in Upper Canada, sued the defendant for the injury, bringing her action within six months. Taking the Statute literally, that disabled any person from bringing an action afterwards, as the master of the young woman. * * * Not only the words of the Statute, but the reason of the thing also, prevent our holding that the plea is well answered by the replication. The defendant should not be twice harassed for the same cause of action, that is, we mean, by two persons having no privity with each other."

It thus appears that, if the parent, resident in Upper Canada, sue within six months, the master's action is gone, and that during the six months it is suspended. It would naturally seem to follow that, after the six months had elapsed, if the master should sue on his common law right, it would be a defence to any subsequent action by the resident parent; otherwise the doctrine above declared, that a man should not be twice harassed for the same cause, could not be applied.

The whole difficulty arises from our Statute. Without it the two rights could not co-exist; as, if a right had vested in the master to sue, there could necessarily be no right in the parent, as the woman would not be his servant.

Here, this plaintiff can recover, if at all, only by force of the Statute. He had gone to a foreign country, leaving his daughter, in Canada, in service. Her master here had certainly a right of action. It may be urged, with much force, that, as the father's right depends wholly on the Statute, he is excluded by the language of the third section, in consequence of his being abroad when the injury

was done, and when a cause of action therefor was vested in the actual master: "Any person other than the father or mother, who, by reason of the relation of master or otherwise, would have been entitled at common law to maintain an action for the seduction of an unmarried female, may still maintain such action, if the father or mother be not resident in Upper Canada at the time of the birth of the child, which may be born in consequence of such seduction, or being resident therein, does not bring an action for the seduction within six months from the birth of such child."

In *Kirk v. Long* (7 C. P. 364) Draper, C. J., says: "The third section is applicable only to the case of the seduction of an unmarried female; but it seems to shew that in such case the father or mother cannot maintain the action under the Statute, unless resident within the Province at the time of the birth of the child, &c., for it makes provision in that event for the action being brought by any person entitled to maintain it at common law." This opinion is strongly in favour of defendant's contention. The point was not expressly in judgment in the case cited.

In *McIntosh v. Tyhurst* (24 U. C. 444) the same learned Judge says: "I cannot bring myself to the conclusion that the Legislature, by the Seduction Act, intended to subject the seducer to two separate actions, one at the suit of the parent, when the daughter seduced was at the time of seduction serving or residing with another person, upon hire or otherwise, and another at the suit of the person with whom she was residing or serving when seduced, and who, at common law, would have been entitled to recover for the loss of her services, if the Statute did not intervene. * * * The effect of the third section must be either to restrain the master, to whom at common law the right of action would accrue, from bringing such action for six months after the birth of the child, in case her father or mother live in Upper Canada, and then, by implication, for it is not in words expressed, to leave the master

free to assert his right of action against the seducer, in lieu of the latter being liable to an action by the parent under the first section, or to subject the seducer to both actions. To the second branch of the alternative I cannot subscribe."

It is difficult to assign any precise significance to this third section, unless it means that the common law is to remain unaffected in two cases; 1st, if the father or mother be not resident in Upper Canada at birth of child; 2nd, if, being so resident, they, or either of them, do not sue within six months of the birth.

Then, if this common law right be so unaffected, must it not be the *only* right capable of being enforced for such an injury, to the exclusion, first, of the parent's right when resident abroad at birth of child, and, secondly, when such right not exercised within six months after the birth? If not so, then it is difficult to protect a defendant from being harassed by two actions for the one grievance.

It is true that the master may not choose to sue, and so the father's remedy would be barred by the existence of a claim in another, which is not asserted. The answer must be, that, as the father can only sue under the Statute, he loses his remedy when non-resident in the country; at all events, when there is a cause of action at common law vested in the master.

If the result of this view of the law and the authorities be practically to free the defendant from all responsibility, it will be a matter of small regret that a parent, who chooses to go abroad and leave a daughter of fifteen or sixteen years of age far away from his guidance and protection, shall forfeit all claim to have damages awarded to him for the injury presumed to be done to him by her seduction. Looking at the general aspect of these actions, it is perhaps as well for the morality of the community that parents so acting should have no legal remedy.

J. WILSON, J.—The Act, to make the remedy in cases of seduction more effectual, of which the 22 Vic. ch. 77, is a

consolidation, recites, "that in some cases the law fails in affording redress to parents, whose daughters have been seduced." The first clause enacts that the father, or in case of his death the mother, of any unmarried female, who has been seduced, and for whose seduction the father or mother could sustain an action, in case such unmarried female was at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with another person, upon hire or otherwise.

The second clause does away with the necessity of proving any act of service, which was necessary before this statute, for the right of action at common law was given, not in respect to the relation of parent and child, but of master and servant. It went further, and declared that acts of service should in all cases be presumed, and no proof received to the contrary; but it provided that, in case the father or mother of the female seduced had before the seduction abandoned her and refused to provide for and retain her as an inmate, then any other person, who might, at common law, have maintained an action for such seduction, might maintain such action. If there had been no other clause there could have been no doubt as to the plaintiff's cause of action.

The third clause enacts that "any person, other than the father or mother, who, by reason of the relation of master or otherwise, would have been entitled, at common law, to maintain an action for the seduction of an unmarried female may still maintain such action, if the father or mother be not resident in Upper Canada at the time of the birth of the child, which may be born in consequence of such seduction, or, being resident therein, does not bring an action for the seduction within six months from the birth of such child."

Does this clause divest the right of action of the father or mother, which was created by the first clause, in case they do not reside in the Province at the birth of the child, or does it only limit the right of the father or mother to bring

the action within six months after the birth of the child, whether they reside out of or within the Province, or only so in case any other person, who would have been entitled at common law to maintain the action, does bring it? It appears to me not to divest the right of the father or mother, but to declare that, if being out of the Province at the birth of the child, or being within it, they do not think proper to bring an action, then that he, who at common law had the right, may bring the action; but whether this precludes the father or mother from bringing an action after the six months, does not arise in this case and will stand an open question; but I incline to the opinion expressed by my brother Gwynne. The defendant here contends that the limitation of six months applies only to that part of the clause relating to the residence of the father or mother at the birth of the child, and that, in case the father or mother is not in the Province at the birth of the child, they have no right of action under the statute. As I read the statute, the six months within which the father or mother may bring the action, applies to both the predicaments. The father did reside out of the Province at the birth of the child, but brought his action, as I think he well might, within six months after.

If the defendant's contention is right, in this case he would practically escape with impunity. The female seduced was the servant of the defendant's father, who at common law would have the right to bring this action. The defendant is one of his household. Would he bring an action, against his son, for the injury done to him for the loss of service of this stranger?

In construing this statute, we ought to see under what circumstances the statute was passed, and learn, if we can, what the object of the legislature was in passing it. See *L'Esperance v. Duchesne* (7 U.C. 148). The struggles of the earlier settlers for existence, frequently compelled the younger members of a family to leave home and engage in domestic service; but those in whose employment they engaged were of the same class, and usually treated their ser-

vants as members of the family, and in their associations held them as their equals. Nor was it unusual for the younger members of families from the British Isles, both male and female, to precede their parents and settle here, betaking themselves to domestic service till they had bettered their condition and acquired experience of the country. To their credit it must be said that sufferers, for whose delinquency the right of action was given to the parents, were by no means exclusively of this class; but they were under their very condition a class, where the common law right was no remedy for them. But if the Act was passed to give a right of action to those, who otherwise would have been without redress, and the recital in the first Act shews this, we ought, in construing it, not to narrow its application. For these reasons, I think, this action lies at the suit of the plaintiff.

With great deference to the opinion of the learned Chief Justice, I have differed from him in the construction of this statute, but, after a careful consideration of it, I am unable to concur in his views.

GWYNNE, J.—With the greatest mistrust of my own judgment, as I have found myself, after the best consideration I can give this case, to be unable to concur in the judgment which the learned Chief Justice has formed, I have thought it right that I should express my view of the statute more at large than I otherwise should have.

If I were asked what cases the Statute 7 Wm. IV. ch. 8, now ch. 77 of the Consolidated Statutes of Upper Canada, was intended to provide for, I should instance the present as *one* of the most, if not *the* most prominent, as being a case wholly remedyless, unless the parent in the position of the present plaintiff is entitled to avail himself of the provisions of the Statute to maintain this action. Unless, therefore, a parent, in the position of the present plaintiff, is, by the language and terms of the Act, either expressly or by irresistible implication excluded from the benefit of the Act, I

am bound to say that in my judgment his case comes within its letter as well as its spirit. The plaintiff is, I think, entitled to such a construction, (if the statute is capable of such a construction) as shall be consistent with the maintenance of this action. We are as yet neither embarrassed nor assisted by any express decision upon the precise point raised here. Although there have been many cases before the Courts under the Statute, none of them raised the point which now for the first time is brought up for our adjudication. We are therefore not only free to exercise, but bound to exercise, our judgments in putting such a construction on the Statute as shall appear to us most consistent with its terms and best calculated to attain its object, which I take to be, to provide redress to parents for the seduction of their children when not living under their protection. In *Kimball v. Smith* (5 U. C. 33) Robinson, C. J., speaking of the Act, says: "It dispenses with the necessity of giving actual evidence of service rendered by the daughter to her father, and places the plaintiff, in that respect, in the same situation as he would be either here or in England, after the relation of master and servant had been established by evidence." In that case Macaulay, J., although his judgment is not reported, said, as appears in his judgment, in *Lake v. Bemiss* (4 C. P. 432), that he was of opinion that the Statute "had virtually changed the nature of the action from one resting on the relation of master and servant to that of parent and child, and in effect to entitle the parent to an action for seduction of his or her child, except that it somewhat inconsistently requires proof that such seduction led to consequences that would have established loss of service in an action founded on the relation of master and servant, although neither the relation of master and servant, nor the loss of service in fact, is required to be proved." In *L'Esperance v. Duchesne* (7 U. C. 148), wherein it was held that the action lay at the suit of the parent for the seduction of his daughter, not living under his protection, *before* the birth of a child, Robinson, C. J., says: "In England, in effect, and in this country, I may

say, *in terms*, since our Statute 7 Wm. IV. ch. 8, the grievance which the law regards and desires to afford redress for is the injury to feelings, the mortification, the domestic unhappiness, the blighted hopes, which follow the seduction; and this must all be suffered before the birth, when the pregnancy is known." However he continues: "The Statute authorizes no new form of action, but deals with the action of seduction as already well known to the law. It enables us to look upon the relation of master and servant as existing in all such cases for the purposes of this action, and it leaves the question of fact, as to what would be an interruption of such service, to rest on the same ground as it does in England, and as it did here before the Statute was passed." Such evidence, then, of loss of service, as would entitle a master at common law to recover in an action for the seduction of his servant, will entitle the parent to recover under the Statute for the seduction of his unmarried child, notwithstanding that she was at the time of her seduction serving or residing with another person upon hire or otherwise. The Court of Error and Appeal in *Westcott v. Powell* (2 Er. & Ap. Rep. 525) has also decided that an action will lie at the suit of a parent for the seduction of his daughter before the birth of a child, as a consequence of the seduction. The first section, then, of the Act may, as it appears to me, be well said to give the action to the parent, as Macaulay, J., had said, for the seduction of his child not living under his protection, although, coupled with the second section, we must, upon the authority of the above and all the other cases which have come before the Court, hold that the action is given to him in the character of master for the seduction of his servant, which relation, as existing between the parent and child in the given case, the statute will not permit to be disputed. If, then, the first and second sections stood alone, without the third, the result would plainly, as it appears to me, be to divest the actual master, when the girl seduced is dwelling under the parent's protection, of all cause of action for the seduction, and to vest absolutely that cause of action in the parent

of the child, in the character, however, of master, so as to entitle him to recover, as he would at common law, if the child was dwelling under his roof or protection at the time of the seduction. The first section gives the action unqualifiedly to the parent, whether resident in Upper Canada or not at the time of seduction. This is the period, not the birth of a child, which governs the vesting of the action at common law.

In *Kirk v. Long* (7 C. P. 363) the parent, who was the plaintiff, never had been resident in Upper Canada, and a child had been born before action brought. The learned counsel, who argued the case for the plaintiff, assumed the position, that "the father of an unmarried female, though living in England, can maintain this action under the Statute." This position was not denied by the other side, nor by the Court, although, if not sound and if the action was only *given* by the Statute to *parents residing in Upper Canada at the time of the birth of the child*, the objection would have been equally fatal in that action as in this, notwithstanding that the defendant in that case was the person with whom the daughter lived at the time of the seduction and at the time of the birth of the child. There Draper, C. J., it is true, says: "The third section is applicable only to the case of seduction of an unmarried female; *but it seems* to shew that in such a case the father or mother cannot maintain the action under the Statute, unless resident in the Province at the time of the birth of the child, which shall take place in consequence of such seduction, for it makes provision, in that event, for the action being brought by any person entitled to maintain it at common law." The expression, "*but it seems to shew*," &c., indicates very plainly that the learned Chief Justice did not intend to convey that he had arrived at a conclusive opinion upon that point, which he would not, I think, have failed to express, if he had, upon a point sufficient to decide the case before him, if the action was only given to parents residing within the Province at the time of the birth. His observations rather indicate that he passed by that point for

the purpose of resting his decision upon another, upon which his mind was conclusively made up, namely, that a widow was not an unmarried female within the meaning of the Act. It remains, therefore, still an open question whether the third section cannot receive a different construction and one, with the utmost deference, I submit, more consistent with the letter and spirit of the Act.

What then is the construction to be put upon the third section, in connection with the first and second, and consistent with the decisions in cases which have arisen under the Act? Is it that the action is only *given to* parents resident within Upper Canada at the time of the birth of a child? or rather that the third section operates merely in the event of certain contingencies, as giving to the person, who but for the Act could at common law have maintained the action, the privilege of bringing an action, which but for this third section he would have been absolutely deprived of the right of ever maintaining? The latter appears to me to be the true construction, not the former, and for the following reasons:

Because, 1. The former construction would constitute a difference between parents resident within Upper Canada and those resident abroad, for which I can see no express warrant in the Act, nor can I see any sound reason for such a distinction.

2. The former construction would, in all cases of parents suing for the seduction of their unmarried daughters, serving or residing with another person, necessitate the postponement of the action until the birth of a child, for whether the parent would or not on the happening of that event, be resident within Upper Canada could not be determined until the happening of the event, and such a construction would involve the overruling of *L'Esperance v. Duchesne* and *Westacott v. Powell*; and,

3. Because the former construction would involve the necessity of holding that the action given by Statute to the parent is of a nature and character different from the common law action of seduction, in which the birth of a child

is not a necessary condition and so, in effect, would involve the overruling all the cases decided, which have established that the action given to the parent partakes of the nature and character of the common law action in *all* respects, *save only* that the Statute creates an incontrovertible inference of law that the right to the service of the child is attached to the relation of parent in all cases.

I conclude, therefore, that the third section can only have the effect, in certain contingencies, of giving to a person other than the parent the privilege of bringing an action which, but for this third section, was by the first section completely vested in the parent before the birth of a child, or notwithstanding that no child might ever be born as a consequence of the seduction; and if the effect of the third section is to divest the parent of the action unqualifiedly vested in him by the first section, then it follows that the matter urged here as a defence to this action, being matter subsequent in defeasance of an action already vested, if a defence at all, can only be offered by a special plea. Such being the nature of the matter urged by way of defence, the observations of Draper, C. J., in *Healey v. Crummer* (11 C. P. 530) do not, as it appears to me, apply, but the rule that matter subsequent, in defeasance of an action, must be specially pleaded, does apply.

But would the matter urged here as a defence, if pleaded, constitute a good plea in bar? A plea simply alleging the birth of a child, and that at the time of the birth the parent of the girl seduced, suing for the seduction, was not resident within Upper Canada, would in my judgment be clearly a bad plea; for such a plea would be consistent with the fact that there was no person in Upper Canada, who would have been entitled at common law to maintain an action for the seduction, and it is only to such a person that the third section contemplates giving the right to maintain an action, if none shall have been brought by the parent under the first. The mere fact, then, of the birth of a child, as a consequence of the seduction, coupled with the fact of the non-residence in Upper Canada of the parent of

the seduced girl at the time of such birth, will not *divest* the parent of the seduced girl of the action given to him by the first section. If we add to these facts the further fact, that at the time of the birth of the child there was a person resident in Upper Canada, "who would have been entitled at common law to maintain an action for the seduction, will all these facts concurring upon the instant of the birth of the child *divest* the parent of the action? Not necessarily so in my opinion. It might be that at the time of the seduction the daughter was residing with one person, and during any inability to serve, arising from pregnancy, with another, and at the time of the birth with another; or it might be that the person, with whom she was residing at the time of the seduction, was the seducer; and yet, although the parent should not be resident in Upper Canada, either at the time of the seduction or of the birth of the child, there might be a person in this country *in loco parentis* to the girl, who at common law might maintain an action, if the girl at the time of the seduction entertained the *animus revertendi* to the domicile of the person who stood to her *in loco parentis*. Such a person would conform to the description referred to in the third section as "a person other than a father or mother, who, by reason of the relation of master or otherwise, would have been entitled at common law to maintain an action for the seduction." Now, all these facts might concur consistently with the arrival of the father of the seduced girl to reside in this country on the day after the birth of the child. Can we then say that there is anything in the Act which, under such circumstances, manifests the intention of the Legislature to *divest* the parent of the action for the purpose of vesting it in the person standing *in loco parentis*, or, to take the facts of the present case, for the purpose of vesting the action in the father of the seducer to the exclusion of the parent of the seduced? There is nothing of the kind expressed in the Act: there is no good purpose that can be served by giving it such a construction. We are justified in being astute, if need be, to avoid giving it such a con-

struction. The Act does not, in express terms, speak of *divesting* the parent of his action at all. If then we can give reasonable effect to the third section, without the necessity of such a construction, I can not think that we are justified in holding that the birth of the child, coupled with the residence of the parent of the seduced girl out of Upper Canada at the time of such birth, and with the residence within Upper Canada at that time of a person who would have been entitled at common law to maintain an action for the seduction, will necessarily of themselves, *without something more*, *divest* the parent of the action given to him by the first section; and in my judgment such reasonable effect can, without any such construction, be given to the third section.

That section, as I have said, does not in express terms speak of divesting the parent of his action at all; and therefore it should not be held to be divested *except from an irresistible necessity*. The section provides that "if the father or mother be not resident in Upper Canada at the time of the birth of the child, which may be born in consequence of such seduction, or being resident therein, does not bring an action for the seduction within six months from the birth of such child, any person other than the father or mother, who, by reason of the relation of master or otherwise, would have been entitled at common law to maintain an action for the seduction, *may still maintain such action*."

Now, the first section gives to the parent the action without any qualification as to his place of residence, or as to whether a child be born ever or not. The action is vested in the parent prior to, and irrespective of, the birth of a child; but it is observable that two conditions precedent at least, must concur before any other person shall, under the third section, have any right to maintain an action for the seduction, namely, the birth of a child, and either the non-residence, at that juncture, of the parent of the seduced girl in Upper Canada, or, if resident therein, neglect on his part to bring

an action within six months after the birth. So that it may be said that the action which is given to the parent partakes more of the nature of the common law action than that given to another person. Then, upon these contingencies happening, the third section says such other person *may* still maintain an action. Now, by the Interpretation Act, 22 Vic. ch. 22, sec. 18, sub-sec. 2, the word *may* in the Statutes is to be construed as permissive. The object, then, of the section, as it appears to me, is to provide a greater security that, in the event of the absence of the parent, or his neglect, the injury to the girl shall not go unredressed; and the effect is in such cases to *permit* another person, in lieu of the parent, to maintain an action, which but for that permission could not, consistently with the prior sections, ever be brought. The happening of the contingencies may be said to vest in such other person a permission to bring an action in lieu of the parent, but not to vest the right of action in him absolutely until he shall avail himself of the permission, by commencing the action, which, when commenced, may, during its pendency and after judgment therein, operate as divesting the parent of the action given by the first section, because and because only of the impossibility of there existing at the same time two actions at the suit of different persons in the same character against the same person for the one wrong. Then and then only, as it appears to me, the necessity arises for holding that the parent is divested of the action given by the first section. So long as the parent does bring an action, and anticipates such other person in doing so, although after the happening of the events which vests in such other person the permission to bring an action, in order that the wrong may not go unredressed, the main object of the Statute, which Sir John Robinson has pronounced to be, in *L'Esperance v. Duchesne*, "to redress the injury to the feelings of the parent, the blighted hopes, the mortification, the domestic unhappiness, which follow the seduction," is better served than by placing it in the power of the parent

of the seducer to control the action to the prejudice of the parent of the seduced, and so to inflict a deeper injury upon those feelings, to blast with more malignity those blighted hopes, and to intensify, beyond possibility of redress, the mortification of the parent of the seduced. I cannot suffer myself to be persuaded that such was the intention of the Legislature, nor can I concur in holding that anything expressed in the Statute justifies such a construction. Every purpose of the Statute is, in my judgment, obtained by our holding that primarily the action is vested absolutely in the parent of the seduced girl, wherever he shall be resident, and that the parent is not ever divested of that action, unless, nor until, after the happening of the contingencies mentioned in the third section, such other person there referred to shall, in the exercise of the permission thereby granted to him, bring an action against the wrong doer, so that the injury may not go unredressed. In this case the parent alone has brought an action, and therefore it is not necessary now to enquire whether or not, if an action, being brought by such other person, referred to in the third section, after the happening of the conditions precedent therein mentioned, should abate, as the action brought by the parent in *Cross v. Goodman* (20 U. C. 244) did abate, the right of action of the parent should revive. I refer to the point, however, for the purpose of observing that, if the point should arise, it cannot be determined, in my opinion, upon the same principle as that which was sufficient to decide the case of *Cross v. Goodman*, in which it was held that the parent, in whom primarily the the action is vested, having commenced an action before the time when by the third section any other person could maintain an action, and that action having abated, such other person never could maintain an action. The reason of that decision is in all respects consistent with the view I take of the Statute, and is this, that, as the conditions precedent to such other person maintaining an action had not happened, and under the circumstances never could happen, no other person than

the parent could maintain the action. It is, as it appears to me, a very different question whether the action of the parent may not *revive*, in the event of the abatement of an action by another person, brought after the happening of the contingencies mentioned in the third section, as there is a wide difference between a right of action which never had vested, by reason of the non-fulfilment of certain conditions made precedent to its accruing, and the *revival* of a cause of action, primarily vested in the parent and which had accrued prior to the commencement of the abated action, and which may reasonably be held to have been only suspended during the pendency of the abated action. The purpose of the Statute will be best attained by holding that the parent's action is only suspended during the pendency of the action by the other person, *and conditional upon its being bona fide prosecuted to judgment*. That construction may be necessary in order effectually to prevent the father of the seducer defeating the remedial object of the Statute, by instituting an illusory action never intended to be prosecuted to judgment.

We cannot overlook the fact that it is part of the policy of the Government of this country to invite young persons of the female sex to leave the protection of their parents and come from abroad to make this country their home : it would be a painful thing if we should be compelled to pronounce a judgment, which would have the effect of declaring that, notwithstanding such invitation, they have not equal protection by our law with the children of parents residing among us, and that our law abandons them, without redress, to the danger to which the virtue of young females is most exposed, namely, the seductive advances of the members of the family of the persons to whose care they may be confided.

In arriving at the conclusion that our law is not open to that reproach, I feel convinced that there is no necessity for straining a letter of the Statute, and that the fullest effect is given to all of its provisions by giving it the

construction which I do, and by holding that the letter and spirit of the Statute sustain the present action.

Rule discharged.

ROE V. ROYAL CANADIAN BANK.

Insolvency—Money received in ignorance of insolvency—Right of assignee to recover back—Pleading.

Held, on demurrer to the plea set out below, that a payment made by an insolvent, after the issue of a writ of attachment against him, on account of a draft discounted by defendants for him, and which was dishonoured by non-acceptance, was recoverable back by the official assignee, though the defendants were ignorant of the insolvency when they received the money from him.

Declaration, for money payable by the defendants to the plaintiff, as assignee to the estate of one Henry; for money had and received by defendants for the use of plaintiff, as such assignee, and for interest.

Plea, that defendants were bankers; that before said Henry became insolvent, and when he appeared to be in solvent circumstances, he drew, through defendants' Bank, a draft for \$1800 on a firm in New York, to his own order; that he endorsed it to defendants, who cashed it; that draft was returned protested for non-acceptance; that thereupon said Henry repaid \$600 (plaintiff's claim), being part of same money he had received on cashing draft; that said money was not deposited to credit of account of said Henry, nor paid on account of any indebtedness other than afore-said; that it was not a payment which assignee was entitled to recover.

Demurrer, That the allegations in the said plea did not shew that the money alleged therein to have been repaid by the said Henry to the defendants, was not the plaintiff's money, when it was so repaid to the defendants, or that it was not received by the defendants to the plaintiff's use, as in the declaration alleged.

A. N. Richards, Q. C., for the demurrer, referred to the Insolvent Acts of 1864 & 1865.

Harrison, Q. C., contra, cited *Edwards v. Glyn*, 2 E. & E. 49; *Converse v. Michie*, 16 C. P. 167; Insolvent Act of 1864, s. 4, sub-s. 9, s. 8, sub-s. 4 & 5.

GWYNNE, J., delivered the judgment of the Court.

The 22nd sub-section of section 3 of the Insolvent Act provides that, "upon the appointment of the official assignee (in compulsory liquidation), the whole of the estate and effects of the insolvent, *as existing at the date of the issue of the writ* of attachment, and which may accrue to him by any title whatever up to the time of his discharge under this act, and whether seized or not seized under the writ of attachment, shall vest in the said official assignee in the same manner *and to the same extent*, and with the same exceptions, as if a voluntary assignment of the estate of the insolvent had been *at that date* executed in his favor by the insolvent."

Sub-section 7 of section 2 declares the effect of a voluntary assignment to be, "to convey and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, *all moneys* and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and movable and immovable property, debts, assets and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, *excepting only* such as are exempt from seizure and sale under execution, by virtue of the several Statutes in such case made and provided."

By the Common Law Procedure Act, sec. 261, all money and bank notes, and cheques, bills of exchange, promissory notes or other securities for money, belonging to the person against whom a writ of *fieri facias* has issued, are made liable to seizure under the execution for the satisfaction thereof.

The Insolvent Act protects no payments whatever made by an insolvent after the issuing of a writ of attachment, notwithstanding that such should be made in satisfaction of a *bonâ fide* debt to a person ignorant of the issuing of the writ of attachment, or of the insolvency of the person paying. The 23rd section of 29 Vic. ch. 18, does protect a payment made by a debtor of the insolvent to the insolvent *within one week* after the execution of a deed of assignment, or of the issue of a writ of attachment, in good faith, and in ignorance of the insolvency of his creditor; but, as observed in *Sowerby v. Brooks* (4 B. & Al. 531), there is as great a difference between a payment made by an insolvent to his creditor and by his debtor to the insolvent, as there is between losing the benefit of a receipt of money and being subjected to make a payment twice over. A receipt from an insolvent operates *pro tanto* in diminution of the distributable fund, and, so far as it extends, defeats the general object of the law, an equal division among all the creditors.

In the absence of a special clause in the Act protecting a payment made, as the payment in this case was, by the insolvent after the issuing of a writ of attachment, although to a creditor ignorant of the writ having issued, the money so paid must be recoverable by the assignee in this action, upon the authority, if authority be necessary, of *Turquand v. Vanderplank* (10 M. & W. 180).

The circumstances attending this payment, if it had been made before the issuing of the writ of attachment, would, I think, clearly have made it bad as a fraudulent preference, and recoverable back. It would be strange if the assignee should be in a worse position in respect of a payment made by the insolvent after the money paid had, by the operation of the Insolvent Act, become the property of the assignee.

The matters alleged in the plea do not shew any trust attached to the money, when received by the insolvent from the defendants, upon the cashing of the insolvent's draft, so as to bring the case within the principle of *Ed-*

wards v. Glyn (2 El. & El. 49), or to make the repayment of the part protected, as a payment made in discharge of a trust attaching on the particular moneys paid.

Judgment must be for the plaintiff.

Judgment for plaintiff upon demurrer.

NEIL V. McLAUGHLIN.

Administration bond—Breach, that administrator did not well and truly administer according to law—Pleading.

In an action against the sureties in an administration bond, plaintiff assigned as a breach of the condition of the bond set out, and which condition was in exact accordance with the form prescribed by 33 Geo. III. ch. 3, and 22 & 23 Car. II. ch. 10, that although a large amount or value of goods, &c., of the deceased had come to the hands of the administrator, he had not well and truly administered the same according to law:

Held, on demurrer, a bad breach of the condition of the bond; and that the only two modes in which a valid breach of this condition can be assigned are, non-feasance in not duly collecting and getting in the estate, whereby it is lost or endangered, or malfeasance in wasting the assets collected by conversion of the same to the administrator's own use, or some other misappropriation whereby the estate is diminished to the prejudice of those entitled to have it forthcoming in the hands of the administrator to abide the orders of the Court.

Action against sureties in an administration bond, entered into before the passing of the Act respecting Surrogate Courts (22 Vic.), but assigned to plaintiff under provisions of that Act.

The condition of the bond set out in the declaration conformed precisely with the form given by 33 Geo. III. ch. 3, and 22 & 23 Car. II. ch. 10. Breaches were assigned in the declaration as follows:

1st. That although a large amount or value of the goods, chattels and credits of the deceased came into the hands and possession of the said administrator, he did not well and truly administer the same according to law.

2nd. That he did not make or cause to be made, a true and just account of his administration.

3rd. That he did not deliver or pay over to the person or persons entitled thereto the rest, residue and remainder of the goods, chattels and credits which remained, and a large sum of money, to wit, the sum of \$1,235.20, still remained in the hands of the administrator unpaid and unaccounted for.

To these breaches the defendants demurred severally, assigning several and distinct grounds of demurrer to each breach.

Hector Cameron, for the demurrer, cited *Archbishop of Canterbury v. Robertson*, 1 C. & M. 6901, S. C. 3 Tyr. 390; *Earl of Elgin v. Crosby*, 10 U. C. 961, 256. [The CHIEF JUSTICE referred to *Bell v. Mills*, 25 U. C. 508].

C. S. Paterson, contra, cited *Young v. Hughes*, 4 H. & N. 76; *Sandrey v. Mitchell*. 32 L. J. Q. B. 100.

Cameron, in reply, referred to *Stephens'* Pl. ed. of 1860, 258, 259.

GWYNNE, J., delivered the judgment of the Court.

Upon the argument the plaintiff's counsel abandoned the second and third breaches assigned, as untenable, and confined his argument to the support of the first breach.

The question is, whether it is a sufficient assignment of a breach of the condition duly to administer, to allege simply that the administrator did not well and truly administer according to law goods come to his hands to be administered, without shewing in particular some dealing with the goods contrary to law and the duty of the administrator.

There are but few cases in the books of actions upon these administration bonds; but, as observed by Robinson, C. J., in the *Earl of Elgin v. Crosby* (10 U. C. 98), the pleadings in such actions must be subject to the same rules as prevail in other actions upon specialties. In that case the breach of this condition was assigned thus: That the

administrators did not well and truly administer the goods and chattels come to their hands, but, on the contrary thereof, goods to the value of £1,000, which had come to their hands to be administered, they, before the commencement of the suit, wrongfully, unjustly and injuriously, and contrary to the condition of the bond, wasted and converted, appropriated and disposed of the same to their own use. I have taken this statement of the breach from the roll, for it is not set out at large in the report of the case.

In *Bell v. Mills et al.* (25 U. C. 501), the breach is assigned thus: that the administrator did not well and truly administer the goods, chattels and moneys of the deceased, come to her hands as administratrix, and did not pay the debts of the deceased, *but, on the contrary thereof*, wholly neglected and refused to pay or satisfy a judgment recovered by the plaintiff against the administratrix, as such, although she had sufficient assets for that purpose, and that she wrongfully, unjustly, and contrary to the intent and meaning of the condition, devastated and wasted the said goods, chattels and money of the deceased, and the same remained unadministered. This breach was held to be bad upon demurrer, for the reason that non-payment of creditors cannot be assigned as a breach of the condition to administer, even though a *devastavit* be suggested.

In *Young v. Hughes* (28 L. J. Ex. 161) the breach assigned was, that the administratrix did not well and duly administer the goods, chattels and credits of the deceased according to law, but wasted, misapplied and converted to her own use divers of the said goods, chattels and credits, and the proceeds and moneys arising therefrom.

In *Sandrey v Mitchell et al.* (32 L. J. N. S. Q. B. 100) the condition of the bond was stated to be, as it was also in *Bell v. Mills*, "and the same personal estate and effects, and all other the personal estate and effects of the deceased at the time of his death, which at any time after shall come to the hands or possession of the said administrator,

or into the hands of any other person or persons for him, do well and truly administer according to law; *that is to say*, to pay the debts which he did owe at his decease;" treating the payment of the debts of the deceased as involved in the condition well and truly to administer; and the breach of this condition assigned was, that the administrator did not well and truly administer according to law the said personal estate and effects, and wrongfully wasted and appropriated and disposed of the same to his own use, and did not pay a debt due to the plaintiff, and thereby the said condition of the said bond was broken, and the bond forfeited. On demurrer, this breach was held bad, for the reason that a creditor suing on the bond cannot assign non-payment of his own debt, as a breach of the condition well and truly to administer, even although he suggest a *devastavit*. This case is precisely in accord with *Bell v. Mills et al.*, in our own Court, and it is to be observed that so much of the breach as alleged a wasting and appropriation and disposal to the administrator's own use, did not aid the assignment of the breach, that allegation being treated merely as a reason assigned for the non-payment of the plaintiff's debt.

Here the plaintiff is not alleged to be a creditor, and so no non-payment of any debt due to him is alleged; but neither is there any appropriation or disposal of any of the estate to the administrator's own use alleged.

In *The Archbishop of Canterbury v. Robertson* (1 C. & M. 690) the condition of the bond appears to be identical with that set out on the record here, and the breach assigned of the condition to administer was, that the said administrator did not well and truly administer according to law the goods, chattels and credits of the said deceased, which came to the hands and possession of the said administrator, after the death of the said deceased, amounting in the whole to a large sum of money, to wit, £30,000, *but, on the contrary thereof*, the said administrator, after the same came to his hands and possession, as aforesaid, and before any or either of the minors in the said condition

mentioned attained the age of twenty-one years, wrongfully, unjustly and injuriously, and contrary to the intent and meaning of the condition, wasted the same, and converted, appropriated and disposed of the said goods, chattels and credits, being of the value aforesaid, to his own use, and the same remain unadministered, contrary to the form and effect of the said condition. In that case it was held that the conversion by the administrator of the intestate's effects to his own use, so that they were entirely lost to the estate, was a breach of the condition of the bond, "well and truly to administer according to law."

This case establishes, then, that an assignee of the bond, not a creditor, suing for the benefit of the estate, may assign a wasting, conversion and misappropriation of the intestate's effects, as a breach of the condition to administer, although the like allegations in an action, by or on behalf of a creditor, for the recovery of whose debt the bond is put in suit, will be treated only as a reason assigned for the non-payment of such debt, and so insufficient. The case also establishes that this condition is quite distinct from those which follow it, as to payment of debts, &c., and accounting, in the ordinary form of bond which is given by the Statute of Charles and our own Statute.

In *The Archbishop of Canterbury v. Tappen* (8 B. & C. 151) the declaration was merely upon the penalty of the bond, to which, after setting out the bond and condition upon oyer, the defendant pleaded, among other things, the administrator did well and truly administer according to law. The replication assigned, in breach of this condition, the neglect and refusal of the administrator to distribute, among the next of kin, the surplus or residue of the intestate's effects, after payment of his debts, which it alleged were paid, and it was held that this was not a breach of this condition.

In *The Archbishop of Canterbury v. Brown* (Lutw. 882) the breach was assigned in the replication, and was that the administrator did not administer according to law, in this, that he did not, although he had sufficient assets, pay one John Herd a bond debt due to him by

the intestate, and it was held that this was no breach of the condition.

In *The Archbishop of Canterbury v. Mills*. (1 Salk. 316) it is said, "Whereas, by the word of the condition, he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate, and therefore a creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be infinite.

In *Kirchoffer v. Ross et al.* (11 C. P. 467) the breach was assigned in the declaration, that the administratrix did not well and truly administer, but, on the contrary, she wasted the goods, chattels and credits which came to her hands, and converted and disposed thereof to her own use.

In no case have I been able to find the naked allegation, that the administrator did not well and truly administer goods, chattels and effects come to his hands, without more, assigned as a breach of the condition well and truly to administer.

That all the cases do state something more, as non-payment of debts, which is no breach; or conversion of the intestate's effects to the administrator's own use, which, when the suit is not brought on behalf of a particular creditor, is a breach, goes far to establish that something more than the naked allegation in the words of the condition is necessary; and, upon principle, I think that such an assignment of a breach is insufficient.

The construction, I think, to be put upon this condition, to be collected from all the cases, is, that the administrator shall use due diligence to collect and get in the effects and credits of the intestate and securely keep them, so that they shall be forthcoming to abide the disposition provided for in the succeeding conditions specified in the bond. Here the complaint is, not that the administrator did not with due diligence get in the estate, but that he did not well and truly administer according to law what has come to his hands. Now, in his hands is the proper place for so much

of the estate to be as he does not apply in payment of debts without an order, until the Judge shall make an order for payment unto such persons as shall be entitled to receive payment or distribution of the intestate's estate. If no such order has yet been made, and no breach of the condition to pay over and distribute can therefore be assigned, we must, I think, in the absence of any allegation that the administrator has wasted or converted, appropriated or disposed of some portion of the assets come to his hand, as administrator, to his own use, assume reasonably that the assets so come to his hands are still in his hands, awaiting the order of the Judge of the Surrogate Court, and if they are, then there cannot be any breach, so far as those assets are concerned, of the condition well and truly to administer. It being the duty of the administrator to receive the assets, and as it is settled that neither neglect or refusal to pay debts, or to distribute the residue among the next of kin, will constitute a breach of this condition, it follows, I think, that, in order to assign a good breach of this condition, in respect of assets received by the administrator, it is essential that some misappropriation of them by him, shewing a loss to the estate, must be averred. The conclusion which, in view of all the the cases, I have arrived at, is, that non-feasance, in not duly collecting and getting in the estate, whereby it is lost or endangered, or malfeasance, by wasting the assets collected, by conversion of them to his own use, or some other misappropriation whereby the estate is diminished, to the prejudice of those entitled to have it forthcoming in the hands of the administrator, to abide the orders of the Court, may be said to be the only modes in which a valid breach of this condition can be assigned.

Judgment must, therefore, be for the defendant on the demurrers to all the breaches.

Judgment for defendant on demurrer.

GALT ET AL. V. ERIE AND NIAGARA RAILWAY CO. AND
THE GREAT WESTERN RAILWAY CO.

*Railway Company Consol. Act—Mortgage of lands by railway—Ultra vires—
Ejectment for railway track.*

A railway company mortgaged land to secure purchase money, subsequently laid down rails upon the mortgaged land and worked the railway :

Held, that the mortgagees were entitled to maintain ejectment, and that such mortgage was not *ultra vires*; that the public rights cannot stand in the way of mortgagees claiming by ejectment; but that where land is taken under the compulsory clauses the compensation must be worked out in the manner prescribed by the Statute.

SPECIAL CASE.

This was an action of ejectment and a special case for the opinion of the Court, the short question being whether the plaintiffs, as assignees of the Bank of Upper Canada, the vendors of the first named defendants, could maintain ejectment against the defendants, under a mortgage of the lands in question, executed by the first named defendants to secure the purchase money therefor, and in payment of which default had been made, the permanent track of the defendants being at the time of action laid down upon the lands, and the usual buildings erected thereon, and by arrangement with the other defendants in their possession and under their control.

The material facts of the case are more fully set out in the judgment of the Court, which was to be at liberty to draw inferences of fact, as a jury.

S. H. Strong, Q. C., and *G. D. Boulton*, for the plaintiffs, cited *Walker v. Ware, Hadham, and Buntingford R. Co.*, L. R. 1 Eq. 195; *Roper v. Crystal Palace, &c., R. Co.*, 3 W. Notes, 48 (Feb. 7, 1868); *Bishop of Winchester v. Midhants R. Co.*, L. R. 5 Eq. 17; *Pell v. Northampton, &c., R. Co.*, L. R. 2 Ch. 100; *Cosens v. Bognor R. Co.*, L. R. 1 Ch. 594; *Williams v. Great Eastern R. Co.*, 3 W. R. 148; *Earl Nelson v. Salisbury, &c., R. Co.*, 3 W. R. 180; *Doe d. Hudson v. Leeds, &c., R. Co.*, 16 Q. B. 796; *Re Hull and Hornsea R. Co.*, L. R. 2 Eq. 262; *Doe d. Myatt v. St.*

Helen's R. Co., 2 Q. B. 364; *Wickham v. New Brunswick R. Co.*, L. R. 1 P. C. 69; *Cole*, Eject. 491, 469, 499; *Redfield*, 546; *Coote*, 197; *Chalmers & Paterson on Railways*, 606, *et seq.*

Roaf, Q. C., and *Anderson*, for the defendants, cited, in addition to the authorities referred to by the other side, *Rankin v. G. W. R. Co.*, 4 C. P. 463; *Cotton v. Hamilton & Toronto R. Co.* 14 U. C. 87; *Peto v. Welland R. Co.*, 9 Gr. 455; *Simpson v. Ottawa, &c., R. Co.*, 1 Chan. Cham. Rep. 126.

HAGARTY, C. J.—It does not seem necessary to notice the state of the title prior to the ownership by the Bank of Upper Canada. On the 19th March, 1866, the Bank conveyed the premises to the Erie & Niagara Railway Company by deed, in fee, for \$40,963. On the negotiations for the purchase, the company not being able to pay cash, it was agreed that the Bank should convey to them, and that they should execute a mortgage, in fee, to the Bank, for the purchase money, which was accordingly executed on 23rd March, four days after the date of the deed. It is averred that the money is all due and unpaid, and mortgagees' estate absolute at law. The railway company have laid down their rails for track on these premises, and use the station-house, engine-house, platform and turn-table, which had been erected on said premises by the former occupiers, the Erie & Ontario Railway Company.

The question is narrowed to this: The railway company insist that they cannot alien in fee any land vested in them, used and occupied for the purpose of their railway, and that this mortgage to the Bank was *ultra vires*; at least, so I understand their argument.

When land is entered on and taken by a railway company under the compulsory clauses, the price to be ascertained by arbitration, or assessment by a compensation jury, or when it is paid into Court under any of the powers given by the Imperial or Provincial Statutes, it appears that ejectment cannot be maintained by the owners, in the event of any

difficulty arising, but the compensation must be worked out as the law provides : see the cases, *Doe Armistead v. N. Stafford Co.* (16 Q. B. 526) ; *Doe Hudson v. Leeds and Bradford Co.* (16. Q. B. 796) ; *Rankin v. G. W. R.* (4 C. P. 463).

We have to consider a widely different question in this case. The land in question was obtained by the company, not under its Parliamentary powers, but by contract from private parties. They bought on the express arrangement that they should re-convey in fee, to secure the purchase money, and we must infer from the statement, that, although a period of four days elapsed between the dates of the deed and the mortgage, that they formed substantially one transaction between the parties, and that when the company laid down their rails and permanent way, they did so upon the land so re-conveyed by them to the mortgagees, unless, as they contend, the mortgage was inoperative to pass the estate out of them. Their Statute (ch. 59, 27 Vic. sec. 17) incorporates the clauses of Railway Consolidated Act (ch. 66 Con. St. Canada), as to powers, lands, &c. Sec. 7, sub. 2, gives power to purchase lands necessary for the construction, maintenance and use of the railway, and also to alienate, sell or dispose of the same. Sub-sec. 3 enables them to take possession of Crown Lands by consent of the Crown, but not to alienate them ; sub. 11 to borrow money on debentures, bond or other security, for completing, maintaining or working the railway, "and to " hypothecate, mortgage or pledge the land, tolls, revenues " and other property of the company for the due payment " of the same."

The power to alienate lands is directly given by the Act, and extensive powers of borrowing money, to be secured by mortgage of the lands, tolls, &c., is also given. Several cases in England were cited, where turnpike trustees were allowed to borrow money on security of the tolls and toll houses, and ejectment was allowed to be brought : *Doe Watton v. Penfold* (3 Q. B. 757) and cases there referred to.

In *Doe Banks v. Bouth* (2 B. & P. 291), ejectment for three toll houses on a mortgage thereof by the trustees, Lord Eldon, C. J., says: "Being authorized to grant a real interest in the toll houses, all the consequence at law must attach upon that interest, unless excluded by the Act; and it is not for this Court to say that the Legislature ought to have restrained the mortgagee from seeking his remedy by ejectment."

It would seem, under the Railway Consolidated Act, that when the company borrows money, they may mortgage their lands, tolls and revenues. If they do so, I do not see how Lord Eldon's view of the consequences must not be the correct one, and it would be fatal to the main argument of the defendants, against alienation of the property of the corporation. If the company had borrowed the price of this land from plaintiffs, bought the land therewith for their railway, and then mortgaged it to them, I hardly see how the clause above cited would not apply. It would be a singular state of the law, if the assignees of plaintiffs, who sold the land to the company to lay their track upon it, on the express agreement to have the purchase money, secured by mortgage thereon, should be in a worse position than the mere lenders of money, under clause 11, "for the completing, maintaining or working of the railway."

In *Walker v. Ware & Buntingford R. Co.* (L. R. 1 Eq. 195) a bill was filed claiming a lien, as an unpaid vendor of land, sold under an agreement to the company and used by them for their road, and to enforce the lien, if necessary, by a sale. It was urged that the purpose for which the land was required was inconsistent with the existence of a lien. Lord Romilly, M. R., says: "I admit the rights of the public are to be considered; but can it be said that a railway company may take a man's land without paying for it, and when he seeks to enforce payment of the purchase money, set up, as a defence, the right of the public? I know of no authority for such a contention, and I certainly will not be the first to sanction it. The public, in my opinion, cannot be interested in having a man deprived of his property."

A decree was made for a sale, if money was not paid by a day named.

Bishop of Worcester v. Mid Hants R. W. Co. (L. R. 5 Eq. 17) was somewhat similar, and Stuart, V. C., used strong language against the argument, that railway companies were different from other vendees, as to enforcing remedies: "It is quite new to me to hear that any Act of Parliament has authorized any railway company to take and use land, under a contract for purchase, with a view to their own profit and the conveniences of the public, without performing their contract." He distinguished the case cited, of *Pell v. Northampton & Banbury Co.* (L. R. 2 Ch. 100), as not upholding a contrary doctrine.

The remarks of Lord Romilly, in *Attorney General v. Sittingborne R. W. Co.* (L. R. 1 Eq. 639) are in point. In *Roper v. Crystal Palace Co.* (Weekly Notes, Feb. 1868, page 48) and *Sedgwick v. Watford R. W. Co.*, the Master of Rolls said there should be the same decision as in *Walker v. Ware R. W. Co.*, already noticed. See also *Wickham v. New Brunswick, &c., R. W. Co.* (L. R. 1 P. C. App. 64).

There are some cases in which, at the suit of a judgment creditor, it was apparently considered that the railway itself, or the company's interest in it, was not saleable; such as *in re Bishop's Waltham R. W. Co.* (L. R. 2 Ch. 383). But, on the other hand, the right of the creditor, who has sued out his *elegit*, is strongly put: see Vice Chancellor Stewart's judgment in *Legg v. Mathieson* (2 Giff. 79) and of Wood, V. C., in *Potts v. Warwick & Birmingham Canal Co.* (1 Kay. 146), where he held that the *elegit* creditors might have the right of occupying the land covered by defendant's canal, subject to the Act of Parliament, which vested the property in the company for the purposes of the Act, and for no other purpose. The *elegit* creditor would take it subject to its use as a canal. I also refer to *Tripp v. Chard R. W. Co.* (17 Jurist, 887).

I am of opinion, on the case submitted, that our judgment should be for the plaintiffs for all the premises for which defence is made.

GWYNNE, J.—It is stated in the case, or to be collected by reasonable inference from what is stated, which inference we are directed to draw, in the same manner as a jury ought, that the defendants, being desirous of acquiring from the Bank of Upper Canada certain lands, of which the Bank was seised in fee, and being unable to acquire and pay for them in the manner provided by the Railway-clauses Act, entered into an agreement with the Bank, that the Bank should convey the lands to the defendants, and that the defendants should, for the purpose of securing payment of the purchase money agreed upon, execute back a mortgage of the same lands to the Bank, in fee, subject to redemption, upon payment of the purchase money by instalments ; that, in pursuance of this agreement and for the purpose of carrying it into effect, the Bank executed a conveyance of the lands to the defendants, bearing date the 19th day of March, 1866, and that the Company executed the mortgage agreed upon to the Bank, dated the 23rd day of the same month of March. It was contended, upon behalf of the defendants, that during the interval between the 19th and 23rd of March they were seised, in fee simple absolute, of the lands, for the purposes of their railway, and that when they executed the mortgage, dated the 23rd March, they were dealing with lands, devoted to a public purpose, in a manner not authorized by law, and that the mortgage was an act *ultra vires* ; but the case does not state, if there were anything in the point, that the defendants were, during this interval, so seised of the lands. It is quite consistent, or rather more consistent, with what it does state, and I therefore take it that the case does sufficiently state, or that it is by reasonable inference to be collected from what it does state, that, although the deed to the defendants bears date the 19th day of March, from the circumstance, perhaps, of the seal of the Bank being at Toronto, and although the mortgage is dated the 23rd day of March, from the circumstance, perhaps, of the seal of the defendants' company being kept in the County of Lincoln, the delivery of both deeds took place at the same instant

of time. However, this makes little difference, for I find it to be sufficiently stated that none of the corporate powers of the Company were exercised upon these lands until after they were re-transferred to the Bank by the mortgage, and that both deeds were executed for the purpose of giving complete effect to the agreement for the purchase, in virtue of which alone the defendants acquired any interest in the lands. The case proceeds to state that the mortgage so executed has been duly assigned to the plaintiffs, and that default has been wholly made in payment of the moneys secured by the mortgage, and that the estate of the plaintiffs has become absolute in law, and that to enforce the remedies to which they claim to be entitled in law, they have brought this action of ejectment.

These then being the facts, it has been contended, on behalf of the defendants, but no case cited to us establishes, and I confess that I have not looked for any in the expectation of finding one which does establish, that any principle of public policy requires us to hold that the defendants, in violation of the express terms and conditions of the agreement, upon which they acquired any interest in the land, can set up the deeds by which effect was given to the agreement, for the purpose of defeating its effect, or that any principle of justice permits us to hold that the instruments, upon the faith of which the defendants were permitted to enter upon the lands, shall not have that full effect and operation which, when executed, they were intended to have, and upon the faith of their having which they were executed, or to hold that the defendants, by reason of their character as a railway company, have by law conferred upon them the special privilege of acquiring the property of individuals through the medium of a fraud committed upon these individuals, and of demanding the aid of a court of justice, whether of law or equity, to enable them to consummate that fraud.

If it was *ultra vires* in the defendants to execute effectually their portion of the agreement, justice would seem to require, and the seat of justice is not confined to Courts

of Equity, that they should not hold that which they only acquired upon the faith of that agreement, and upon the faith of its having been perfected by the instruments executed to give it effect.

It is said, and the authorities clearly establish, that if no mortgage had been executed, the Bank and their assignees, as unpaid vendors, could get effectual relief in equity by sale of the lands. This being so, the argument from public policy fails; for there can be no reason why the demands of public policy should not be as imperative in equity as at law. The principle, as I take it, of the cases, which have decided that persons, who have by special contract permitted railway companies to carry on their works upon their lands, cannot treat such companies as trespassers and eject them, is, that having chosen to accept a special contract, in lieu of the provision made by the law, they shall be held to that contract and to such remedies as are incident to it. That is the principle which the plaintiffs claim the benefit of here; namely, that they shall have the benefit of the contract which was entered into with the defendants, which was that they should hold merely as mortgagees, subject to ejectment, upon default in payment pursuant to the terms of the mortgage. I entertain not the slightest doubt that the *legal* estate in these lands, which passed to these defendants, for the purpose of enabling them to execute the mortgage, which they have executed, passed back again under the mortgage to the Bank, and is now vested in the plaintiffs, and incident thereto have passed all the remedies, both at law and in equity, which are incident to ordinary mortgages, and among these remedies that by ejectment on default. The plaintiffs, therefore, are entitled to judgment for all the lands which are claimed in this action.

WILSON, J., concurred.

Judgment for plaintiffs on the special case.

BAKER V. JONES.

Malicious arrest—Want of reasonable and probable cause—Evidence.

In an action for malicious arrest, the affidavit, on which the order for the *capias* issued, stated that the deponent (defendant) had been informed by certain parties, one Oliver and one Widdifield, that they had heard plaintiff state that he would soon "fix" his property, so that he could go to live with his daughter in the United States, and that plaintiff had led them to believe that he contemplated leaving Canada and putting his property out of reach of his creditors. At the trial plaintiff called Oliver, who, at first, flatly contradicted defendant's affidavit, but on cross-examination said that Widdifield had gone to see plaintiff, who owed him money, which however he did not get; that plaintiff said he had a daughter in the States, and if he had his business all right or all "fixed" he would go to her; that defendant was asking him (witness) about this, and he told him he did not know; that he did not tell defendant, in Widdifield's presence, that plaintiff was going away as soon as he got his property "fixed"; that he did not tell him so until the other day, since being up in town to attend this trial; that he did not "*know*" he had ever told him anything about it; that he had told Widdifield. With this evidence plaintiff closed his case, *without calling Widdifield*, who was then called on the part of the defence, and stated that he knew plaintiff had been indebted to defendant for some time; that he accompanied Oliver in his visit to plaintiff, when Oliver offered him for some articles more than they were worth, in order to get his money, but plaintiff refused to let him have them; that plaintiff spoke of his daughter in the States, and said he would go there if he had all things right; that he wasn't making much on the farm; neither paying debts, nor making much more than a living; that there did not seem much prospect of his paying Oliver, and that he was owing a good deal; that he told defendant, on his return, that before long plaintiff would be off to the States; that plaintiff promised to call and see defendant about his debt, which he never did; that he (witness) had frequently told defendant he had better look out for himself or he would lose his debt; that defendant became more alarmed when he heard of plaintiff's having tried on a former occasion to abscond, when he was arrested and imprisoned, and that he (witness) had subsequently, in answer to an application for his discharge, sworn that he inferred from a conversation he had with him that he intended to get rid of his property and go to the States, and that he (witness) had informed defendant of this before the plaintiff's arrest:

Held. that the Judge should, on this evidence, as a matter of law, have held there was no want of reasonable and probable cause, and that a nonsuit ought therefore to have been entered.

Action for malicious arrest.

The declaration alleged that defendant, having no reasonable or probable cause for believing that plaintiff, unless forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally, or defendant in particular, *maliciously* represented that such

was the fact, and thereupon *maliciously* procured a Judge's order for the issue of bailable process against plaintiff, and caused plaintiff to be arrested and held to bail for \$114.32.

Plea, not guilty.

Issue.

At the trial, at St. Thomas, in April, 1868, before Hughes, County Judge, sitting for Richards, C. J., plaintiff proved the arrest, the writ of *capias*, the Judge's order therefor, and the affidavit of the defendant, upon which that order was obtained. The affidavit contained the following paragraph:—"That I have been informed by James Oliver, of, &c., and by John Widdifield, of, &c., that they did each of them hear said Baker lately state that he would soon fix his property so that he could be off to live with his daughter in South Carolina; and that said Baker then led them, said Oliver and Widdifield to believe that he said Baker contemplated leaving Canada and putting his property out of the reach of his creditors.

3rd. That I do verily believe that the information so given me is correct and true.

4th. That for the reasons aforesaid, and from other information, I do verily believe that said Baker, unless forthwith apprehended, is about to quit Canada, with intent to defraud his creditors."

James Stanton, called by plaintiff to prove the above affidavit, which was sworn before him, a practising attorney at St. Thomas, upon cross-examination, stated that he advised defendant that upon the facts which defendant represented to him, as set out in the affidavit, he would probably lose his debt unless he arrested plaintiff. Several witnesses were then called, who spoke of plaintiff's property, and among those, plaintiff's landlord, from whom he rented a farm. These witnesses stated their belief that plaintiff had no intention of leaving the country, one witness saying that he did not see how he could run away, if he wanted. The plaintiff's landlord, however, proved that plaintiff's son, who was a joint-maker, with his father, of several notes, had gone to the States, and

plaintiff had told witness that he had a daughter living in Kentucky, but witness never heard plaintiff speak of going there. This witness also said that defendant, a short time before he issued the *capias*, enquired of him as to the likelihood of plaintiff's going away; but witness told him there was none; that defendant spoke of the son having gone away, to which witness replied that, if he had gone, he had taken nothing off the place.

Plaintiff then called Oliver. On his examination-in-chief he stated, simply, that he never told the defendant that plaintiff would soon fix his property, so that he could go off to his daughter in *South Carolina*; but, on cross-examination, he said: "One John Widdifield and I went up to see plaintiff last fall: he owed me money, and I went to see if I could get it: he owed me \$6 or \$7, and I went to see if I could get it, and I did not. He said he had a daughter in *Kentucky*, and if he had his business all right, or business all fixed, he would go to his daughter in *Kentucky*. Defendant was asking me about it: I told him I did not know: I did not tell defendant, in presence of John Widdifield, that so soon as he got his property fixed he was going away. *I did not tell him so until the other day, since being up in town to attend this trial.* I do not know as I ever told him anything about it. *I did tell Jack Widdifield.* I never heard Widdifield tell defendant about it."

Plaintiff did not call Widdifield, but closed his case here, when defendant's counsel moved a nonsuit, upon the grounds—

1st. That plaintiff had not shewn absence or want of probable cause; that although he had called Oliver to negative the affidavit, he had not called Widdifield.

2nd. That he had not proved malice, and that the defendant having been advised by counsel, and having satisfied the Judge, no malice could be inferred.

It was agreed between counsel for plaintiff and defendant that leave should be reserved for the defendant to move.

The defendant then called Widdifield, who testified that he knew that plaintiff was indebted to defendant for some

time ; that witness accompanied Oliver when he went up to try and get from plaintiff, some money which he owed him ; that Oliver offered plaintiff for five new bob-sleighs more than they were worth, in order to get his pay, but that plaintiff would not let him have them ; that plaintiff then said that he had a daughter in Kentucky, and that if he had things all right he would go there too ; that he was not making much on the farm ; that he was not paying his debts ; that he was not making much more than a living. Witness said that there did not seem much prospect of his paying Oliver, and that plaintiff was owing a good deal ; that when witness returned he told defendant that before a great while plaintiff would be off to the States to his son-in-law, who lived there ; that plaintiff promised Oliver he would be down before long to see him and get things straightened up ; that Oliver said he would sue him if he did not get his pay ; that plaintiff spoke also of coming to see defendant about his debt, but he never came ; that witness had told defendant he had better look out for himself or he would lose his debt ; that witness had frequently since spoken to defendant in the same way, when he would be speaking about plaintiff not coming down to see him : did not know whether Oliver ever spoke to defendant about it, but he had spoken to witness about it ; that defendant became more alarmed when he heard some news to the effect that plaintiff had tried to run away from the place where he had lived before, but that he had been caught and put in gaol. Witness had made affidavit in answer to an application by plaintiff to be discharged from the arrest, in which he set out particulars of the conversation at plaintiff's, and stated that he inferred therefrom that plaintiff intended to get rid of his property and go south to his daughter in Kentucky, and that he had so informed defendant before the arrest. This affidavit was read. Witness further stated that plaintiff was considerably in debt, which was also proved by other witnesses.

The Judge told the jury that plaintiff was bound to

prove the absence of reasonable or probable cause, or the presence of an actual malicious intent; that if the jury were satisfied that in point of fact neither Widdifield nor Oliver told the defendant what was alleged in the affidavit to hold to bail, from which the defendant, as a reasonable man, might infer that there was good and probable cause for believing that plaintiff, unless forthwith apprehended, was about to quit Canada, with intent to defraud his creditors, then there was a want of probable cause, from which malice might be implied, and that they should find for plaintiff; but that if they should find that the statement, as represented in the affidavit, was *bond fide* made, either by Widdifield or Oliver, and that they were persons upon whom he ought to have reasonably relied for such a statement, then to find for defendant. The jury found for plaintiff and \$45 damages.

In Easter Term last *E. Crombie* obtained a rule *nisi* to set aside this verdict and to enter a non-suit, pursuant to leave reserved, on the grounds,—1st. That plaintiff's evidence shewed that defendant told his attorney and counsel all the facts, and was advised by him to arrest the plaintiff, and that defendant acted under his advice. 2nd. That the plaintiff did not prove want of probable cause or actual malice on the part of the defendant. The rule was also for a new trial, because the verdict was against law and evidence and the Judge's charge.

Moss now shewed cause, citing *Hewlett v. Cruchly*, 5 Taunt. 77; *Add. Torts*, 525; *Ravenga v. McIntosh*, 2 B. & C. 677, per Bayley, J.; *Riddell v. Brown*, 24 U. C. 90; *Nourse v. Calcutt*, 6 C. P. 14; *Crawford v. McLean*, 9 C. P. 215; *Fellowes v. Hutchinson*, 12 U. C. 633; *Griffith v. Hall*, 26 U. C. 94; *Daniells v. Fielding*, 16 M. & W. 200; *Fitz-John v. Makinder*, 4 L. T. N. S. 149.

Crombie, contra, cited *Christopher v. Eakens*, 18 C. P. 532; *Wright v. Skinner*, 17 C. P. 317, 334.

GWYNNE, J.—The declaration appears to be very loosely framed: it does not allege that the defendant made any

false representation to the Judge, by which he procured the order to arrest the plaintiff: it is not alleged that what the defendant did was done *falsely* and maliciously; yet the very gist of the action consists in the falsity of the representations; for, however maliciously the defendant made true representations to the Judge, which were sufficient to warrant the arrest, it would seem that no action lies since the passing of the Statute 22 Vic. ch. 24 (Consolidated Statutes of Upper Canada). No objection has been made upon this ground; still, however, the frame of the declaration creates embarrassment when we have to consider what is the issue joined between the parties, and what is the evidence requisite to establish that issue to entitle a plaintiff to sustain a verdict upon it in his favor. For the purpose of this rule I take it that the plaintiff (although no objection has been taken to the frame of the declaration) can claim no more favorable consideration of the case than if his declaration contained, at least, the averment "that the defendant *falsely* and maliciously procured the Judge's order for the issue of bailable process against the plaintiff." This, as it appears to me, is what he would have to prove in order to maintain his action. In *Daniels v. Fielding* (16 M. & W. 207) it is laid down that the gist of the action now is that the party obtaining the *capias* has imposed on the Judge by some false statement, some *suggestio falsi*, or *suppressio veri*, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to leave the country; and it is there said that it is essential, under the present statute, that the plaintiff, in an action for malicious arrest, should allege falsehood or fraud in obtaining the order; and further, that the declaration ought to state what the false charge or statement was by which the Judge had been misled. There it was held that, *after verdict*, the averment, that the defendant "falsely and maliciously, and without any reasonable or probable cause, caused and procured the Judge, to make the order, was sufficient, for the reason that the term "falsely" must be taken to mean "by false evidence," which, although the

declaration might be bad on demurrer, was held sufficient after verdict.

As regards this declaration, when we come to consider whether a sufficient cause of action has been proved against the defendant, we cannot do more in support of the verdict, I think, than assume that the word "falsely" is contained in the declaration. The declaration, in substance, then, would be, according to the authority of *Daniels v. Fielding*, "that the defendant, by false evidence or representations, "maliciously procured," &c., and this would be what the plaintiff would have to establish in proof.

In order to do so it is essential that the plaintiff should produce, and accordingly in this case the plaintiff did produce, and prove the making by the defendant of, the affidavit upon which the Judge's order was obtained, and that it was used for that purpose. Now this affidavit, when produced as part of the plaintiff's case, shewed that the reasons for the belief, which the defendant alleged he entertained, that, unless apprehended, the plaintiff was about to leave this country, with intent to defraud his creditors, consisted in certain information which he set forth in his affidavit, and which he said had been communicated to him by one James Oliver and by one John Widdifield, respectively. The words of defendant's affidavit are, "that for the reasons aforesaid, and from other information, I do verily believe," &c., &c. Upon that affidavit being produced, as it had to be by the plaintiff, I confess it does appear to me that the onus was cast upon the plaintiff of further proving that the statement, which the defendant had made as to the information he had received from those persons, was substantially untrue; not that it was incorrect in some verbal differences or minor particulars, but that it was false that either of these persons had in substance communicated any such information to him in such a manner as to be received by him as and for truth.

The several witnesses, called by the plaintiff to testify to their belief that the plaintiff entertained no such intention as the affidavit imputed to him, do not, as it appears to me,

throw much light upon such an issue, and if neither Oliver nor Widdifield had been called by the plaintiff, I think there can be no doubt that the plaintiff would have wholly failed to establish his cause of action, and that he should have been non-suited. But the plaintiff did call Oliver, and in examining him he seems to have thought it sufficient to establish a literal inaccuracy in the statement made by the defendant in his affidavit. Oliver's cross-examination, however, does disclose that the plaintiff had said something to Oliver about his going to his daughter in *Kentucky*; and that, if he did not communicate to defendant the substance of what defendant says he did before the arrest, it seems he could have done so; for he says, "I did not tell defendant, (that is, before the arrest), in presence of John Widdifield, that so soon as he got his property fixed he was going away: I did not tell him so until the other day, since being in town to attend this trial." I must confess that this evidence, upon such an issue, does not impress my mind favorably as to the desire of the witness to tell, or of the plaintiff to elicit from him, the whole truth: it involves too many negatives pregnant to be satisfactory to me. However that was matter of comment to the jury; for I admit that, if the defendant had in his affidavit referred to Oliver as the only source of his information, the Judge could not have ruled, as a point of law, that the evidence shewed that the defendant had probable cause, and have withdrawn the case from the jury; but the question is, inasmuch as the defendant had referred, in his affidavit, to Widdifield, equally with Oliver, was the Judge justified, upon Oliver's evidence alone, to leave the case to the jury, the plaintiff not having called Widdifield? The question depends upon this, what was the extent of the issue joined between the parties, and to what extent was the onus of proving it cast upon the plaintiff? It appears to me to be clear that, if either Oliver or Widdifield had communicated to the defendant the substance of the information which he says in his affidavit that each of them did communicate to him, the defendant had in point of law reasonable and probable

cause for procuring the order for plaintiff's arrest to be issued.

Does, then, the circumstance of the defendant having alleged that he received the information from each of them shift the onus upon him to prove that he received it from Widdifield, upon the evidence given by Oliver as to his not having received it from him? Does Oliver's evidence establish that the defendant had not that probable cause, which the information stated, if communicated to him by Widdifield, would have afforded? Or does Oliver's evidence shew sufficient to justify a Judge in leaving it to a jury to draw, as a reasonable inference, that the defendant did not receive the information from Widdifield either? I must say that, in my judgment, these questions should be answered in the negative. I think that the onus, which the production of the defendant's affidavit cast upon the plaintiff, was to prove that neither Oliver nor Widdifield communicated the alleged information to the defendant (and so the Judge in his charge seems to have treated it); for if Widdifield did, though Oliver did not, still, I think, there remained sufficient to establish probable cause for defendant's procuring the order. Applying the principle of *Daniels v. Fielding* to this particular affidavit, I think the onus was cast upon the plaintiff to give some evidence that neither Oliver nor Widdifield had communicated to the defendant any such information as alleged, in substance, sufficient to warrant the defendant in entertaining the belief which he says he entertained, and that the Judge was in fact imposed upon by evidence wholly false or perverted by the defendant. I think, then, that, upon the close of the plaintiff's case, the defendant was entitled to the benefit of the assumption that Widdifield had communicated to him the substance of the information which the defendant stated in his affidavit, and upon that assumption it was, I think, a point of law, to be decided by the Judge, that the absence of *the particular probable cause*, alleged by defendant in his affidavit, had not been established: *Wyatt v. White* (5 H. & N. 371); *Joint v. Thompson* (26 U. C. 519).

But the defendant, on the defence, called Widdifield, who, I think, established the substance of the information which the defendant alleged that he had given him. This witness also testified that the defendant's alarm increased when he learned that the plaintiff had attempted to run away from a place where he had lived before, but that he had been caught. This witness's testimony was wholly uncontradicted; in fact, he had made an affidavit to a similar effect, in answer to an application made by the plaintiff for discharge from the arrest; which circumstance may account for the plaintiff not calling him. There was no motive whatever imputed to the witness, from which it could be inferred that he was not speaking the truth; there was no doubt cast upon the truth of what he alleged. As to his evidence, there was nothing whatever to leave to the jury, and upon the evidence at the close of the defence, I am of opinion that the Judge should have decided, as a point of law, that the defendant had reasonable and probable cause. The only difficulty, as it appears, arises, on a point of practice, namely, whether the agreement, reserving leave for the defendant, at the close of the plaintiff's case, to move to enter a non-suit (the defendant not having renewed the motion at the close of the defence), can be extended to a leave reserved in all events; that is, if, at the close of the defence as well, the Court should be of the opinion that the plaintiff should have been non-suited, and I do not see why it should not be so construed. My own opinion is, as I have expressed it, that, having regard to the terms of defendant's affidavit, the onus was cast upon the plaintiff to negative what the affidavit alleged Widdifield had communicated to the defendant; but *Riddell v. Brown* (24 U. C. 96) is a clear authority that if, at the close of the defence, a non-suit had been asked, the plaintiff should have been non-suited; and as, in view of Widdifield's testimony, the action cannot be sustained, I think that the non-suit should be entered now, instead of exposing the parties to the costs of another trial. There can be no pretence that the plaintiff had not the fullest opportu-

nity to attack, if he could, the correctness of Widdifield's testimony, or to question his credibility: he knew from his affidavit already made what he could prove. The plaintiff might, if he thought it would have served his case, have examined Oliver as to the fairness or unfairness of Widdifield's version of what passed between him and Oliver and the plaintiff, or as to the fairness of the inference which Widdifield drew from that conversation. Notwithstanding Oliver's evidence, as to his not having made any communication, in respect of his interview, to the defendant, before he read his affidavit, I think it is fairly to be gathered from his evidence, on cross-examination, that, as to the facts of what had taken place at the interview, and as to the impression formed upon *his* mind therefrom, there could have been little or no difference between him and Widdifield; and even if it should have appeared that Widdifield had formed a wrong impression, still, if he communicated what he says he did to the defendant, in which he is wholly uncontradicted, the action cannot be sustained. There seems, therefore, to be no sufficient reason for protracting the litigation further by sending the case to another trial.

HAGARTY, C. J.—I do not wish to lay down any rigid rule as to the plaintiff being obliged to call or not to call any particular witness or witnesses; but I concur in the result arrived at by my learned brother. On the not very satisfactory evidence of Oliver, and the clear and uncontradicted testimony of Widdifield, I think the Judge should, as a matter of law, have held there was no want of reasonable and probable cause, and that the rule for non-suit should be made absolute.

WILSON, J., concurred.

Rule absolute to enter non-suit.

IN THE COURT OF ERROR AND APPEAL.

SWEENEY [DEFENDANT IN ERROR] v. THE PRESIDENT,
DIRECTORS & COMPANY OF THE PORT BURWELL HARBOUR.
[PLAINTIFFS IN ERROR].

Harbour company—Pier lights—Removal—Notice—Loss of vessel—Non-liability—General issue.

The defendants, a harbour company, on the 5th November, 1866, resolved to close their harbour upon and after that day, to discontinue the receipt of tolls, and to remove the light, which was placed on the western pier as a guide to the entrance; this determination having been come to in consequence of the water between the piers, and on the bar outside them, having become so shallow as to endanger the "larger class of vessels," which were in the habit of entering the harbour, and cause the stormy weather had prevented their dredging it out. A printed notice of this resolve was accordingly on that day put up at Port Burwell, and also sent to different Collectors of Customs, both in the United States and in Upper Canada, for publication in several newspapers, in which it was inserted. One of the notices was put up in the Custom House in Buffalo, and was also published in a newspaper there on 9th November. Plaintiff arrived in his vessel, from a port west of and beyond Port Burwell, on 7th November, having seen defendant's light on his way down, and on the 10th November he cleared again from Buffalo on his return trip, and on the morning of 11th November, in his endeavor to enter defendants' harbour, in consequence of stress of weather, the vessel struck on the western pier and was lost, the immediate cause of the striking against the pier being, as appeared, the absence of the light, the presence of which would have enabled the vessel, which was of light draft, to enter. Up to the time of the accident neither plaintiff nor any one on board had any actual notice of the removal of the light : *Held*, reversing the judgment of the Court of Common Pleas, 17 C. P. 574:—

- 1st. That defendants had authority, under the circumstances, to close the harbour and remove the light.
- 2nd. That the notice of the closing was sufficient, and that plaintiff was not entitled to actual personal notice of the fact.
- 3rd. That defendants were not, therefore, liable to plaintiff for the loss of his vessel, and that they were entitled to a verdict on the plea of *not guilty*.

ERROR upon the judgment of the Court of Common Pleas, reported in 17 C. P. 574, where the pleadings and facts of the case are fully set forth.

The defendants assigned the following grounds of error :

1. That there was no duty cast by law on the defendants to keep up a light on their piers, and they were

The case was argued on 4th January, 1869, before Draper, C. J. in Appeal, Richards, C. J., VanKoughnet, C., Hagarty, C. J., Spragge, V. C., Morrison and A. Wilson, JJ., Mowat, V. C., Gwynne, J.

entitled at any time to remove the light, which they had been accustomed to keep up.

2. That, at most, they were only bound to keep up such light while they continued to take tolls from vessels entering their harbour, and, as soon as they ceased to collect tolls, they were entitled to remove it.

3. That they were at liberty to remove such light on giving public notice, and that all persons, desiring to use the harbor for the entry of vessels, did so, upon such notice being given, at their own risk, and it was therefore unnecessary to prove actual notice to the plaintiff.

4. That plaintiff was not entitled to complain of the removal of the light, as he had no intention of entering the harbour in the course of the voyage, upon which his vessel was lost, or of paying tolls to the defendant, and had actually passed it on his voyage and then turned back.

5. That the defendants were bound to remove the light under the circumstances stated in the arbitrator's finding with respect to the condition of the harbour and its neighborhood.

6. That from the arbitrator's finding it appeared there was danger in continuing as well as in removing the light, and the defendants, having acted *bonâ fide* in the exercise of their judgment, were not responsible.

The 7th and 8th errors were mere repetitions in substance of the preceeding.

9. That the plaintiff should not have been allowed the \$672 expended by him in endeavoring to save the vessel.

M. C. Cameron, Q. C., for the defendants in Error.—Two questions arise in this case :—1st. Was there any liability on defendants part for the loss of the vessel ? 2nd. As to the measure of damages.

As to the first, plaintiff claimed that the removal of a certain light by defendants was a wrong, and caused the loss. Defendants reply they gave notice. The accident happened on 11th November, and the first notice was published 6th November, but was wrongly dated in October,

and the plaintiff's vessel, on night of the 6th, left Port Stanley.

The defendants had a right to close their harbour: *Berryman v. President, Directors and Company of Port Burwell Company*, 24 U. C. 34; *Parnaby v. The Lancaster Canal Co.*, 11 A. & E. 233; *Gibbs v. Trustees of Liverpool Docks*, 3 H. & N. 177.

The question is one of reasonable notice.

Then, as to damages, the defendants could only be liable for the value of the vessel, less her value as she lay sunk, without adding the money spent in endeavouring to save her.

Moss, on same side:—

The defendants' negligence, according to plaintiff, was the removal of the light, and giving no proper or sufficient notice.

There was no obligation on defendants' part to keep up a light longer than they charged tolls. Till they began to demand tolls, defendants could not be liable for having no light, or for the harbour being incomplete or unsafe.

A notice was unnecessary; at least, *actual* notice to plaintiffs was unnecessary; but there was notice, which it might be reasonably expected would have reached plaintiff.

Plaintiff was not bound for this Port Burwell Harbour: he only desired to use it as a harbour of refuge.

He cited *Gilbertson v. Richardson*, 5 C. B. 502; *Greenland v. Chaplin*, 5 Exch. 248; *The Gazelle*, 2 W. Rob. Ad. 281.

J. H. Cameron, Q. C., (*Duggan*, Q. C., with him), contra: The liability of this Company has been decided, Trin. 3 & 4 Vic.; *Webb v. Port Bruce Harbour Co.*, 19 Q. B. U. C., 623; *Berryman v. President, Directors and Co. of Port Burwell Co.*, 24 Q. B. U. C. 34.

The declaration is founded on the improper removal of the light, which was indispensable for entry into the harbour, and if it had been there the arbitrator finds plaintiff's vessel could have got in. The Court below held there

was no reasonable notice given, and that plaintiff had no actual notice.

He also referred to *The Mersey Docks and Harbour Co. v. Penhatton*, L. R. 1 H. of L. E. & Ir. Ap. 93; *The Mersey Docks, &c., v. Gibbs*, *Ib.*; *Coe v. Wise*, L. R. 1 Q. B. 711.

DRAPER, Chief Justice in Appeal (March 13th, 1869).—[After setting out the pleadings, with the material facts as found by the arbitrator].—I am of opinion that a primary duty is cast upon the defendants, as owners of an artificial harbour for receiving and sheltering vessels, for the use of which they are entitled, under the Con. Stat. U. C. ch. 50, sec. 30, to demand tolls, to keep and maintain their harbour in such a condition that all persons, having a legal right to use it, may do so without risk or danger from the actual condition of the works constructed, or from the state of the immediate and necessary approaches thereto, or from the absence of such lights, marks or other guides and directions to point out the entrance, as would be reasonably sufficient to enable persons in charge of vessels, who may approach, to enter by night as well as by day. What lights or other directions are proper, or should be deemed sufficient, is a question on which, in the first instance, the directors of the harbour company must exercise their discretion. By receiving tolls they in effect contract for the fulfilment of such a duty.

This duty is, however, subject to some limitations. It is notorious that harbours, such as this of the defendants, are, during the winter season, inaccessible for any purpose of navigation. The law fixes no date when the season of navigation begins or ends. Insurance companies have, I believe, some practice or rules as to taking risks on vessels or cargoes before or after certain days; but, as applicable to harbour companies, I know of no such rule. The cessation of the carrying trade upon Lake Erie does not exclusively depend on the question whether the harbours upon it are accessible, and the navigation of this lake is but one link in a long chain of communication. It may be argued

with some force that the duty itself must cease for some period during every winter, and a case may be easily suggested in which a harbour company might rely on such temporary cessation. The defence would in effect be that an irresistible law of nature, a *vis major*, prevented the use of their harbour, and while it continued they could be subject to no liability, because their harbour could not be entered, or be safely entered, or afford security for vessels which might succeed in getting in. Other natural causes, uncertain as to when they will arise and as to their duration, may, nevertheless, so affect the harbour or its approaches as to render it unsafe. It is the immediate duty of the company to use every reasonable effort to restore the harbour to the condition of being capable of receiving and sheltering vessels. So long as their harbour is inaccessible or unsafe, the condition on which their right to tolls depends, does not exist, and the cause of this being beyond their control, and their right to tolls held in suspense, it would appear unjust, during the inevitable interval to make repairs, &c., to hold them responsible for accidents to vessels which approach and try to enter. In *Webb v. Port Bruce Co.* (19 U. C. Q. B. 623) it was said by this Court they must either remove the obstruction or close their harbour, "*by giving notice to the public that it cannot be safely approached.*"

Therefore, generally speaking, whenever, after a company, by receiving tolls, have asserted that their harbour is in a state to receive and shelter vessels, such harbour becomes unfitted for that purpose, either from dangers in the approach or entrance, or insufficient protection when within its limits, the company are *primâ facie* liable to compensate those who have suffered proximate damage from any such cause. They must relieve themselves from this *primâ facie* liability.

The sudden action of a violent tempest might fill in the space between the piers of an artificial harbour, or form a bar in front of it, and before it has become passable, with every reasonable exertion to remove such obstructions,

(perhaps even before the company had become fully aware of their existence), vessels might sustain damage in trying to enter; but even in this case the company would have to establish the facts, in order to repel the *primâ facie* liability. As long as the harbour is professedly open and they receive tolls, and damage accrues to any one, using reasonable care in approaching and trying to enter, they are certainly *primâ facie* liable, and the *onus* of repelling that liability is on them.

In the present case, however, the directors of the defendants' company had, on the 5th November, resolved to close their harbour upon and after that day, to discontinue the receipt of tolls, and to remove the light which was placed on the western pier as a guide to the entrance. The determination to close was arrived at, because, between the piers and on the bar outside them, the water was so shallow as to endanger the "larger class of vessels" which used the harbour, and because stormy weather prevented dredging it out.

Closing the harbour is rather a metaphorical form of expression. There could be no actual closing, as in a canal or dock, by shutting the gates and refusing to open them to admit any vessel. The discontinuance in receiving tolls would be equivocal. If no opportunity was afforded for claiming them, the only thing that could be done was to notify the intention not to collect, and then it would stand on the same footing as closing the harbour; namely, a declaration of intention publicly notified. The removal of this light was an intention carried into effect.

The right of the defendants to give up all claim to receive tolls, and so to discharge themselves from the duty of maintaining open a harbour capable of receiving and sheltering vessels, has not been contested. Neither the declaration nor the finding of the arbitrator brings these matters into question: the plaintiff's claim is founded on the removal of the light alone. The duty of keeping the harbour in reasonable repair is stated, but no breach of this duty is alleged.

The object and use of the light is thus stated by the arbitrator :—" The light marks the entrance to the harbour, and enables vessels in the night time to run between the piers ; and I find, as a fact, that the light is necessary to enable a vessel to enter with safety in the night time." If it be assumed that the harbour was, as the third plea asserts, obstructed by large accumulations of mud and sand, which the defendants were unable immediately to remove ; in other words, that the harbour was not for the time capable of receiving and sheltering vessels, and that the right to tolls was placed in abeyance, can it be said that the alleged duty to maintain the light during all times of night or darkness continued ? The light was necessary to enable a vessel to enter, but not to prevent an attempt to enter and meet the danger of insufficient depth of water. So long as it was exhibited, it must, I think, be regarded as an invitation, or an assertion that vessels might enter ; while its absence, after having been maintained, as the declaration asserts it was, if not a warning, something very like it, that there was a change. Suppose it to have been still kept up, and a vessel endeavoring to enter had grounded, and was lost or damaged, might not the exhibition of the light have been appealed to as an improper act of the defendants ?

The arbitrator, after finding the depth of water, on the bar outside and between the piers, to be eight and a half feet, states that it was " dangerous for such large vessels to attempt to enter the harbour in stormy weather, when loaded, with the depth of water which existed on the 5th November." The word " such " refers to a previous finding, that " some of the larger class of vessels, which trade to Port Burwell, draw, when fully loaded, from eight to over nine feet water." The plaintiff's vessel was about 150 tons burthen ; her draught when light was only four and a half feet ; but I do not attach weight to this circumstance, because, if the state of the harbour, or the approach to it, made it unsafe for *any* vessel which traded to it, I think the directors might properly close the harbour to *all* vessels till the obstructions were removed.

Arriving at the conclusion that the directors had authority to close the harbour, under the circumstances established, what they are found to have done was to resolve, on the 5th November, to close it, as already stated. They put up a printed notice of their resolve on that day at Port Burwell, and sent numerous notices to different collectors of customs, as well in the United States as in Upper Canada, and had such notices published in several newspapers, the details of which the arbitrator fully states. One of these notices was put up in the custom house in Buffalo, and was also published in a newspaper in that city on the 9th November. In my opinion these acts afforded reasonable and sufficient evidence of notice to the public not to attempt to enter the harbour. The plaintiff arrived in his vessel from Port Stanley on the night of the 7th November, having seen the defendants' light at Port Burwell on the way down, and on the afternoon of the 10th he sailed from Buffalo for Port Stanley. The arbitrator finds expressly that neither the plaintiff nor any one on board the vessel had, until the morning of the 11th November, any actual notice or knowledge that the harbour had been closed or the light been removed: they discovered the latter fact when it was too late to change the course of the vessel.

After no little doubt, I have arrived at the conclusion that the defendants are entitled to a verdict on the plea of not guilty. I think that the removal of the light was an act neither wrongful nor negligent, if for sufficient cause the harbour was closed. The arbitrator's finding shews that cause. As to the actual closing or evidence of closing I have felt the principal difficulty. The arbitrator does not find as a fact that it was closed; nor, in the nature of things, as far as is shewn, could there have been closing corresponding with the shutting up the gates of a dock or a canal: he finds only the resolution to close, to cease levying toll and to remove the light, and the fact of sending notices to many different ports on Lake Erie and elsewhere, as well as to certain specified newspapers, and that such a notice was put up in the custom

house at Buffalo, and was inserted in a Buffalo newspaper on the 9th of November, while the plaintiff's vessel was in that port, which it did not leave until the afternoon of the 10th. It may be well presumed that the plaintiff would visit that custom house in order to clear his vessel from an American to a Canadian port. It cannot, I think, be the law that actual personal notice to every ship-owner or ship-master navigating Lake Erie would have been necessary. The plaintiff did not clear for Port Burwell: if he had, it would have been remarkable if the notice had not attracted his attention. He was bound for a different port, and sought Port Burwell only as a harbour of refuge from stress of weather. Any and every other vessel on that lake might have taken the same course, and if actual personal notice was necessary to protect the defendants, they would, probably, in nearly every case be unprotected. It is not a duty imposed on such companies that notice should be so given: I rather regard notice to the public as one of the evidences that the harbour is closed, than as a right, to which every owner of a vessel, who wishes to make use of the harbour on an emergency, can lay claim, and that proof of such a notice should be deemed sufficient proof in law of actual notice to the owner. In this case a notice was mailed, on the 5th November, to the collector of customs at Port Stanley, misdated it is true, but still sufficient to challenge attention, and the plaintiff's vessel left that port on the night of the 6th and 7th November. A similar notice was, as already noted, in the custom house at Buffalo, while the vessel was at that port on the 9th and 10th.

RICHARDS, C. J., was absent, from indisposition, and delivered no judgment.

VANKOUGHNET, C., concurred.

HAGARTY, C. J.—The plaintiff seems to rest his case on the alleged wrongful and negligent removal of a light placed by defendants on the end of one of their piers for the guidance of vessels seeking their harbour:

I have always felt great difficulty in holding these harbour companies liable for want of sufficient water, or for

the existence of natural obstructions in or about the entrance. Sometimes one pier, sometimes two, are built from the open shore into the lake, or at the mouth of some creek, generally for the facility of loading and unloading, and not for the purpose of a harbour of refuge. Where no representations as to any particular depth of water, or as to fitness for receiving or sheltering vessels, is made to the public, I think great care should be taken in holding a company liable either for the existence of natural obstructions, or for the insufficiency in the depth of water for vessels navigating the lake.

A further liability is attempted to be imposed on them in this case, viz., the duty to maintain lights to guide vessels in entering the harbour at night; or, perhaps, it should be rather stated as a duty not to remove lights, once placed by them on their piers for such purpose, so long as the season of navigation lasted.

I see no general obligation to have lights at night, any more than in thick weather, or during a snowstorm, to have fog-signals to aid the access of vessels.

Here, it is alleged that the defendants were accustomed to have a red light on their pierhead for the guidance of vessels, and the breach is its wrongful or negligent removal.

I think the facts found by the referee are opposed to to any such charge.

The stormy weather prevented the defendants from dredging the entrance, which was liable to be affected by a shifting sand bar. The defendants, fearing to be made the insurers of some of the larger vessels navigating the lakes, which required a depth of water greater than the eight feet six inches on the bar and between their piers, announced to the public that they had closed the harbour and removed the light; in other words, that they no longer claimed to be a harbour for sheltering vessels or charging tolls therefor. This notice was published in newspapers and sent to various lake ports on the 5th or 6th November; and it was published in the Buffalo Custom House, and in a Buffalo paper, on the 9th November.

On the afternoon of the 10th November plaintiff's vessel left Buffalo on the upward voyage, and was lost, trying to enter Port Burwell, before daylight on the morning of the 11th November.

I cannot see how the defendants can be held liable on these facts. The plaintiff's vessel was not aware of the removal of the light. The same thing might have happened to any vessel that had been one or two months on the upper lakes, after the removal of any harbour light on Lake Erie. Ignorance of the removal cannot of itself give a cause of action.

The defendants, as soon as they find that to a certain class of vessels their harbour was not safely accessible, from the shifting sand, or other cause, not arising from their own neglect, determined to close it, so far as they could. This, I think, they might lawfully do; just as they would do, if some necessary work of repair were going on, interfering with a safe access to the harbour.

In this view they were right, I think, in removing the pier head light. Had they left it burning, it would be argued that they thereby invited vessels to enter. In considering the safest course to be adopted, they might not unreasonably have thought it best to give notice of the closing of the harbour, rather than risk the serious danger of being called on to pay for the loss of vessels trying to enter.

The experience of the past shewed how ready juries have been to fix the harbour companies with liability.

I think the defence was open to the defendants on the issue of "not guilty," and that plaintiff's case fails.

SPRAGGE, V. C.—It does not seem to me to be proved that the disaster to the plaintiff's schooner, which is the subject of this action, is traceable to any wrong or negligence on the part of the defendants. The harbour became unfit for the sheltering of vessels through *natural causes*. When it had become so unfit it would have been obviously improper to have continued to exhibit a light which indi-

cated that it was in a fit state: it would be luring vessels to their destruction. It became their duty, it may be conceded, to give notice promptly and as effectually as they could. It is not shewn that they ought to have closed their harbour or given notice earlier than the 5th of November. On that day they sent notices by mail to ports on Lake Erie, among others, to those between which the vessel was trading. The vessel left Port Stanley on the night of the 6th and 7th November. The notice ought to have been exhibited at the Custom House there before the vessel left. The vessel left Buffalo, on her return voyage, on the afternoon of the 10th: the defendants' notice had been published at the Custom House at Buffalo, and in a local paper there, on the previous day.

I apprehend that it is not necessary to prove actual notice to the plaintiff. The foundation of the action is negligence. The declaration goes upon a wrongful removal of the harbour light. The plea is, that the removal was not wrongful, but proper, for reasons set forth, and that upon its removal due notice was given. It goes on to say (unnecessarily I think), that the plaintiff had actual notice; and there is also a plea of "not guilty." The defendants proved all that is necessary to acquit them of negligence, and so displaced the plaintiff's cause of action.

If there was any error on the part of the defendants, it was in keeping up their light after the 5th; but the plaintiffs do not complain of that, but that the light was not kept up longer still, *i.e.*, to the close of navigation. Upon the issue that is raised, a case for withdrawing the light and notice of that withdrawal, the defendants' case appears to me to be sustained in evidence.

MORRISON and A. WILSON, JJ., and MOWAT, V. C., concurred.

GWYNNE, J.—There do not appear to me to be any facts sufficiently alleged in the declaration, from which it can be collected that there was a duty imposed upon the

defendants to maintain the light, the removal of which is the sole thing complained of.

The declaration does not allege, although evidence is given before the referee to establish, that it was dangerous or impossible to enter the harbour at night without the light. The declaration, it is true, alleges that the defendants wrongfully and negligently removed the light ; but that will not be sufficient, unless facts are stated in the declaration from which the duty to maintain the light follows as an inference of law : *Parnaby v. Lancaster Canal Company* (11 Ad. & El., 242).

The facts stated in the declaration, from which the duty is inferred, are that, for the safety and convenience of vessels entering the harbour at night, the defendants had been accustomed to maintain a light on the end of one of the piers, and that they did maintain it until they wrongfully and negligently removed it without giving any proper or sufficient public notice thereof.

Now, the former maintenance of the light might be quite consistent with the fact that without it vessels might safely enough enter the harbour, and that they could not, although proved in evidence, is not averred; but the maintenance of the light was, I think, an unequivocal invitation to all vessels to enter the harbour, and amounted to a declaration, the consequences of which the defendants could not avoid, that the harbour was in *all* particulars fit and safe to be entered. If, as it clearly appears, the harbour was not so fit, and by reason thereof that the defendants honestly came to the conclusion that they would not levy tolls until they should make it fit, it appears to me that these facts imposed a duty on the defendants to remove the light, as the only effectual mode of warning vessels in the sudden emergency not to approach it. The maintaining it, under such circumstances, might well be regarded as a wrongful enticing vessels into danger, instead of warning them to avoid it. In removing, then, the light the defendants cannot, I think, be charged with a breach of any duty, which the facts in the declaration

imposed upon them, to maintain it. Independently, however, of the averments in the declaration, I agree that the notice given by the defendants, of the fact of the light having been removed, was reasonable and sufficient to exempt them from liability, if there was a duty imposed upon them not to remove the light without notice.

Per Curiam—*Judgment reversed.*

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—ED. CLARKE CAMPBELL, JOHN O'DONOHUE, ALBERT GEO. BROWN, AARON ISRAEL DUNNING, WILLIAM G. McWILLIAM, GEORGE TAILLON, HENRY HALTON STRATTON, WILMOT RICHARDS SQUIER, JOHN HENRY GRASETT HAGARTY, WM. MANDEVILLE MERRITT, COLIN MCDUGALL, ALFRED JOHN WILKES, NEIL MALCOLM MUNRO.

EASTER TERM, 32 VIC., 1869.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

IRWIN V. HUNTER.

Landlord and tenant—Improvements by tenant—Suspension of rent.

Tenant agreed with landlord to make certain improvements upon the demised premises, tenant “to get the first three years’ rent for said buildings and improvements, providing they are completed in the first two years.”

Held, that the rent was suspended during the two years, and that landlord could not, therefore, before the expiration of this period, eject for non-payment.

This was an action of ejectment brought to recover possession of the west half of Lot 31, in the 4th concession of the township of Adjala.

The plaintiff claimed in virtue of a proviso for re-entry, without demand, for non-payment of rent, contained in an indenture of demise, made by the plaintiff to the defendant, or a term which has not expired.

The defendant insisted that under the terms of the indenture no rent was due and no forfeiture incurred.

The question turned upon a clause in the indenture of demise, in the words following, “The said party of the second part agrees to build a house twenty feet by twenty-eight feet, built and finished like Mr. William Duff’s house in Adjala, and is to build a frame barn sixty feet by thirty-

* J. Wilson, J., was absent from indisposition, from the effects of which he died during this Term.

five feet, finished off in a good workmanlike manner; and also agrees to put on one thousand cedar rails, good quality. The said party is to get the first three years' rent for the said buildings and improvements, providing they are completed in the first two years."

The term granted by the lease commenced on the 1st day of April, 1867, and the rent was reserved payable on the 1st day of January, annually. The action was commenced on the 6th day of March, 1869.

At the trial, before the Chief Justice of this court, it was contended for the defendant that the action was premature; that the effect of the above agreement, as to buildings and improvements, was to suspend the rent during the first two years, the whole of which the defendant had to complete the buildings, &c. A verdict was taken for the plaintiff, with leave reserved to the defendant to move to enter a non-suit.

J. A. Ardagh obtained a rule accordingly, which was argued by him on behalf of the defendant and by *McMichael* for the plaintiff. No authorities were cited on either side.

GWYNNE, J., delivered the judgment of the court.

Upon the best consideration which I have been able to give to this inartistically framed instrument, which appears to have been drafted by the parties themselves, so as of necessity to lead to litigation, I think the contention of the defendant is entitled to prevail, and that the rule must be made absolute to enter a non-suit. We must hold that it was the intention of the parties that the defendant was to have secured to him the benefit of the consideration to be allowed to him for the improvements covenanted to be erected and made by him on the demised premises. This consideration is not in the nature of a pecuniary compensation of a specified amount, covenanted by the plaintiff to be paid for the improvements, but the rent itself of the first three years was what was to be allowed to the defendant.

Now, the improvements to be made benefited the reversion, in virtue of which the rent is reserved: it is but reasonable, therefore, that the estate benefited, namely, the reversion, should be bound to the defendant to make good to him the consideration he was to receive. This can only, as it appears to me, be done by our holding that the rent was suspended during the first two years. If, as I think, the reversion, which receives the benefit, should be accountable to the defendant, then, unless the obligation of the lessor, involved in his part of the covenant, passes wholly to an assignee of the reversion, the defendant, on an assignment, would only have the personal covenant of the lessor, in case the assignee could and should distrain for the rent of the first two years; while, as to the third year, he would have his remedy against the rent. In case of an assignment of the reversion, the tenant's remedy would be either partly personal, against the lessor, on the covenant, for damages, and partly against the assignee of the reversion, for the third year's rent, or wholly personal, against the lessor.

Assume that the assignee of the reversion should, if he could, recover the rent reserved, payable in January, 1868, and January, 1869, before the expiration of the two years; that the buildings were duly completed within the two years; the tenant, having paid the first two years' rent, would immediately be entitled to an action against the lessor on his covenant, if it is only personal. What damages could he recover in that action? Not, it would seem, the third year's rent; for the agreement was, that he was to be relieved from that not paid the amount of it a year in advance. It would, I apprehend, under the covenant, be irrecoverable by the assignee of the reversion when it should accrue: the erection of the buildings under the contract would be a payment of that rent the instant of its accruing. An apportionment, then, would have to be made as to the damages recoverable in the action against the lessor on his covenant; yet, such an apportionment does not seem to have been in contemplation of the parties. What the defendant was to be allowed was the

very rent itself reserved. I think, therefore, to avoid confusion, that we must reasonably hold that the rent is suspended, as the only way whereby the defendant could have the full benefit of his contract in the case of an assignment of the reversion.

Rule absolute to enter nonsuit.

JACKSON V. YEOMANS.

Mortgage—Absence of covenant to pay—Pleading.

Held, on demurrer to the plea set out below, that the mere words, contained in the proviso to a mortgage, "in three equal payments to be respectively made," were not sufficient to create a covenant to pay the amounts specified.

This was an action on a covenant to pay \$1,000.

Plea, setting out the deed, which professed to be made under the act for short forms of mortgage, and shewed a bargain and sale, in fee, from defendant to plaintiff, of certain land, in consideration of \$5,400 paid by mortgagee, with proviso for the mortgage being void on payment of \$5,400, as follows: \$100 within twenty-four hours after a result of a crushing of rock from the shaft in said lands was ascertained, such crushing to take place as soon after twelve days from date as a mill could be procured to do the same; the further sum of \$1,000 within three months from the date of this mortgage, and the balance of the above sum, being the sum of \$4,000, in three equal payments, to be respectively made in six, nine, and twelve months from date of deed, and taxes, &c. There were covenants for right to convey; in default for quiet possession; further assurance, and that mortgagor had not encumbered; release of right; that in default mortgagee might enter, lease, or sell, and until default mortgagor to have quiet possession.

There was no covenant to pay the money.

To this plea the plaintiff filed a demurrer, alleging, among other grounds, that it disclosed a deed containing a covenant, for the breach of which this action was brought, and did not answer the said breach in any way whatever.

McKenzie, Q.C., and *George Henderson*, for the demurrer, cited *Pearman v. Hyland*, 22 U. C. 202; *DeTuyle v. McDonald*, 8 U. C. 171; *Yates v. Aston*, 4 Q. B. 182; *Sim v. Edmands*, 15 C. B. 240.

T. Moss, contra, cited *DeTuyle v. McDonald*, supra; *Courtney v. Taylor*, 6 M. & G. 851; *Marryatt v. Marryatt*, 28 Beav. 224; *Isaackson v. Harwood*, L. R. 3 Chy. App. 225; *Cannock v. Jones*, 3 Ex. 233; *Chapman v. Moyl*, 1 Keble, 842; *Briscoe v. King*. Cro. Jac. 281; *Bristoe v. Knipe*, Yelv. 206.

HAGARTY, C. J.—An action was brought in the Queen's Bench for the first payment of \$1,000, setting out that defendant had bargained and sold to plaintiff's wife, setting out this proviso: that the first \$1,000 were due, and that defendant, in consideration that plaintiff would give time for payment for two months, promised to pay it, &c., &c. After issue joined, trial, and leave reserved to enter non-suit, the court last term directed a new trial on the evidence, for better eliciting whether there was a promise in consideration of plaintiffs' forbearing to exercise their rights as to ejecting, selling, &c. The judgment says: "It was necessary to prove a mortgage to support the count, shewing the preceding liability of defendant as a foundation for defendant's promise; and as the deed put in contained no covenant by the defendant to pay the \$1,000, and the cases cited shew that on a mortgage alone no action would lie to recover the moneys mentioned in the defeasance, consequently the defendant's promise was made without any consideration."

This is a direct expression of opinion on this mortgage, and we generally adopt the view of a court of concurrent jurisdiction without question. But it was strongly urged

for plaintiff that, at all events, as regarded the remaining sums, of which the \$1,000 here in suit formed a part, the words in the proviso, "in three equal payments to be respectively made," are sufficient to create a covenant.

We do not consider *DeTuytle v. McDonald* (8 U. C. 171), relied on by plaintiffs, as supporting their view. It was a motion in arrest of judgment, and the declaration contained an averment of an express covenant to pay, and the terms of the mortgage did not appear set out on the record.

Hall v. Morley (8 U. C. 584) is very strong that, "to furnish ground for an action at law, to compel payment of the money, there must be something beyond the mere proviso in the deed, which is simply a defeasance and nothing more." The preceding cases in law and equity are there reviewed.

Pearman v. Hyland (22 U. C. 202) adopts the same view. *Allnut v. Ryland* (11 C. P. 302) may be also referred to.

Courtney v. Taylor (6 M. & Gr. 851) seems strongly against plaintiff's attempt to extract a covenant from the words in the proviso on which they rely. The deed there contained an express acknowledgment that defendant owed a named sum of money to plaintiff, but the acknowledgment appeared to have been made for a collateral purpose. The language of Tindal, C. J., and Maule, J., fully explains the distinction.

Marryatt v. Marryatt (28 Beav. 224) adopts the same view, and in the latest case cited by Mr. Moss, *Isaacson v. Harwood* (L. R. 3 Chan. App. 225, in 1868) Lord Cairns reviewed the cases. A defaulting trustee executed a deed, reciting that he had received a named sum of trust money on behalf of plaintiffs, and which sum he proposed to secure by a charge on certain property. Then came the grant, proviso for redemption, power of sale in case of default, covenants for title, &c., but no covenant to pay the money. The property turned out insufficient to pay the debt, and the contention was, whether the deed made it a

specialty debt, and it was urged that the words amounted to a covenant. Lord Cairns says, "In every case it is a question of the construction of the instrument; what did the parties intend? was it intended that the trustee should give a covenant for payment of the money? There is no different rule in this respect between law and equity. * * In the simple case of a debtor acknowledging a debt by a deed under seal, without any other object declared by the deed, no doubt it must be assumed, though no words of covenant are used, the debtor meant to be bound, or else why should he go through the form of executing a deed?" He then discusses the object of the deed, holding that the sole object of the deed was to give security for the debt, and adds, "In addition to this there is a conspicuous absence of an express covenant to pay the mortgage debt. Mr. Green argued that, in the absence of such a covenant, the proviso for redemption amounted to a covenant to pay the debt. I cannot adopt that argument. I know of no authority for such a contention."

The intention and object of the deed here were, we think, to give the land in security for the original purchase money, and the words so much relied on are merely by way of proviso and defeasance, and there is "the conspicuous absence" of any covenant to pay.

We think we should be violating the sound principle laid down by Lord Cairns, and directly oppose the intention of the parties, if we held this deed to contain a covenant to pay the money.

GWYNNE, J.—I quite concur in the judgment just read by the Chief Justice, and I have no doubt that the clause relied on by the plaintiffs is by way of proviso, and not a covenant.

Judgment for defendant on demurrer.

GRANGE v. MILLS ET AL.

Sheriff—Covenant to indemnify against seizure—Revocation of covenant with sheriff's assent—Pleading.

A sheriff, having two executions against the same party in his hands, accepted a covenant from defendants, one of the execution creditors, indemnifying him against any seizure and sale by him. Before anything was done on either writ defendants countermanded and revoked their covenant, with the assent of the sheriff, who afterwards, however, went on, sold and was damnified. To an action brought by him against defendants on their covenant, defendants pleaded the facts by way of equitable defence, and the court held the defence good, considering that the agreement to indemnify merely created a conditional liability, from which they were at liberty to withdraw before any act done or damage sustained, especially where the withdrawal was with the sheriff's assent.

Quære, per Hagarty, C. J., whether the defence, if good in substance, was not equally good at law and in equity. Per Gwynne, J., that the plea would have been good without averment of the sheriff's assent.

This was an action by the sheriff of the county of Wellington against defendants under the following circumstances :—

The sheriff had two executions against one Bell; one at Rutherford's suit, the other at the suit of defendants. The defendants covenanted with plaintiff to hold him harmless, &c., from one-half of the whole of any loss, damage, &c., which he might be put to from seizing, selling, &c., goods supposed to belong to Bell, under the executions or either of them.

Before the covenant was acted on, or anything done by plaintiff on either writ, or any damage sustained by him, defendants countermanded, revoked and withdrew from their covenant, &c., to which countermand, &c., the plaintiff assented and agreed before doing anything or being damnified; but he afterwards went on, seized, sold and was damnified, an action having been brought and verdict recovered against him for the seizure and sale. He thereupon sued defendants on their covenant of indemnity, who, on their part, pleaded, by way of equitable defence, the fact of the revocation of the covenant, before any seizure or sale, with his assent. To this plea the plaintiff

demurred on the grounds that the facts set forth disclosed no equity to the active interference of the Court of Chancery against the legal obligation declared on; that the plea was no answer either at law or in equity, as setting up, in discharge of an obligation by deed, an agreement which, from all that appeared, was only by parol, and without consideration; that the revocation was a nullity, and could derive no force from plaintiff's mere voluntary consent thereto; that if judgment were obtained against defendants, the facts relied on would not entitle them to equitable relief by way of injunction against such judgment.

Palmer, for the demurrer, cited *Chit. Contracts*, last ed., 799, 800; *Kerr*, Inj. 16; *Cross v. Sprigg*, 6 Ha. 552; *Tufnell v. Constable*, 8 Si. 69; *Peace v. Haines*, 11 Ha. 151; *Add. Contracts*, 5th ed. 915, 1015, 6th ed. 976; *Davis v. Simons*, Cox, Ch. Ca. 402, 406; *Lewin*, Trusts, 5th ed. 663.

John Patterson, contra, cited *Offord v. Davies*, 12 C. B. N. S. 748; *Rees v. Berrington*, 2 Ves. jun. 940; *Barker v. St. Quintin*, 12 M. & W. 441.

HAGARTY, C. J.—The realizing under defendants' execution would be a matter of benefit to them, and was most likely their inducement to agree to indemnify the sheriff and it is probable (though not stated) that Rutherford's suit, being prior, had necessarily to be acted on before defendants' execution would be available.

In the argument for defendants, the case was likened to that of the common guarantee for the debt of another, or that such other should duly pay for any goods furnished to him. In both cases there is a contract of indemnity against the acts of third persons. The ordinary guarantor is surety for a principal debtor; in this case there is no person filling that character; but it is not easy to see why the same principle as to such a cause of discharge of liability as is here stated should not equally apply to both cases. *Offord v. Davies* (12 C. B. N. S. 748) is much in point. A guarantee was given by defendants, in considera-

tion of plaintiff discounting, at defendant's request, bills of exchange for D. & Co. Defendants guaranteed, for the space of twelve months, the due payment of such bills, to extent of £600. Discounts were accordingly made, and not re-paid by D. & Co. Plea, that after making the guarantee, and before plaintiff had discounted such bills, and before advancing the moneys to D. & Co., defendants countermanded the guarantee, and requested plaintiff not to discount such bills and not to advance money. This plea was demurred to, and judgment given for defendants. It was urged that the guarantee was not a mere *mandatum*, but a contract, and that the plea did not allege notice of revocation given before any bills had been discounted, and that it must be assumed, therefore, that some discounts had taken place, which was acknowledged, on argument, to be the fact. Sir William Erle says: "The promise by itself creates no obligation. It is in effect conditional, to be binding if the plaintiff acts on it either to the benefit of defendants, or to the detriment of himself; but, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on, does not appear to be disputed. Then, are the rights of the parties affected either by the promises being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not."

The case was argued very fully, and the court took time to consider their judgment. The judges were Erle, C. J., Williams, Willes and Byles, JJ.

Bradbury v. Morgan (31 L. J. Ex. 462) was referred to. It was a guarantee for advances to a third person, to a named extent, until notice given to the contrary. The guarantor died without giving notice, and the question was whether plaintiff could recover against his executors for advances made after his death. The defence was that the death revoked the guarantee. The court held the defendants liable, saying that the question was whether

it was a mere authority or a contract, and that it was a contract.

It was strongly pressed upon us for plaintiff that there was no consideration for plaintiff assenting to defendants' withdrawal; that it was a *nudum pactum*, and no equity thereby created in defendants' favour; but that argument, and the cases cited in support of it, appear applicable to a different state of facts and a different species of contract; for instance, where a defendant had given plaintiff a bond or other security for money due, or any case where there was an existing claim based on value received, there the subsequent promise not to enforce the claim without new considerations might well be open to the objections urged.

But if we be right in considering this case as analogous in principle to that of a guarantee, then the language of Erle, C. J., may apply, that the contract is in effect conditional, to be binding, if plaintiff act upon it either to defendant's benefit or his own detriment. It will be observed in that case there was no statement, as there is here, that the withdrawal of the defendants was with plaintiff's full consent. When they obtained his assent to their withdrawal, and they knew that nothing had been done up to that time on the faith of their indemnity, they might well cease to interest themselves longer in the matter, and might thereby possibly act very differently, and sustain serious detriment by supposing they were no longer liable.

The obligation here is by specialty. It was suggested that defendants' liability could not be done away with by parol matter. The defence is pleaded on equitable grounds, and in equity the court would not regard the technical distinction: see *Darling v. McLean* (20 U. C. 372), where this objection, on an equitable plea, is fully disposed of. It may be (but we are not called on to decide it) that this defence, if good in substance, is equally good at law and in equity. We think the defence is made out, and that the defendant must have judgment. This agreement to indemnify merely created a conditional liability, and before

any act was done, or damage sustained, we see no valid objection for their withdrawing from it, especially with the assent of the plaintiff.

GWYNNE, J.—This case is not, in my judgment, at all governed by that class of cases to which Mr. Palmer, for the plaintiff, referred us. It may be admitted, as beyond all question, that merely voluntary declarations, indicating the intention of a creditor to release a debt, if they are not evidence of a release at law, do not constitute a release in equity; and that a parol agreement, entered into without consideration for the discharge of a bond debt, will not in equity, any more than at law, operate as a release or discharge of the bond debt; and that a surety cannot in equity, any more than at law, revoke his contract of suretyship after the consideration for the contract has been given; but none of these principles can be applied to prevent a contract, though gratuitous, entered into between the parties to another gratuitous contract, for the rescission of this latter, from having effect.

What in substance is alleged on this record is, that the defendant, without consideration, entered into a contract under seal with the plaintiff to indemnify him to a limited extent against loss in respect of certain proceedings then contemplated to be taken under a writ of execution upon the authority of the defendants' bond; and that before the plaintiff had done anything upon the faith of the bond, and before his position was in any respect altered by reason of it, the plaintiff and defendant, by a parol agreement, mutually agreed to rescind the contract of indemnity of the defendant contained in the bond. I cannot think there can be any doubt that this contract of rescission was effectual in equity, if not at law, to put an end to the contract of indemnity.

From *Xenos v. Wickham* (2 E. & I. Ap. p. 309) it would seem that an endorsement of a memorandum in writing on the bond, with the intention of cancelling it, would in law operate as a cancellation. The plea, which is pleaded upon

equitable grounds, would, in my opinion, have been good without the averment of the assent and agreement of the plaintiff to the revocation. The revocation having been before anything had been done by the plaintiff upon the faith of the defendants' bond, the subsequent execution of the writ by the plaintiff cannot be in equity attributed to the defendants' contract of indemnity, for which contract there was no consideration; and the attempt of the plaintiff to enforce the defendants' contract of indemnity at law, because it was under seal, as if his proceedings had been *bond fide* taken upon the faith of it, would be such a fraud as a court of equity would restrain by injunction. It is the doctrine of equitable fraud, and not the doctrine of release or discharge, that applies to this case; and what the plaintiff asserts upon this record, the right of doing by reason of his legal position as obligee of the bond, is, I have no doubt, a fraud in the view of a court of equity; and it would, in my opinion, be equally so if the sheriff's proceedings had, as alleged, been all commenced after the revocation, although he had not assented to the revocation. Judgment must therefore be for the defendants on the demurrer.

Judgment for defendants on demurrer.

GREENWOOD V. PERRY.

Bills of exchange and promissory notes—Indorser—Non-liability—Pleading.

Defendant having endorsed a note for \$1,230, for the purpose of enabling the maker to obtain, as an additional advance, the difference between that sum and the original loan of \$918, advanced to him before the making of the note, which additional advance was, however, not made, *Held*, that defendant was not liable, as endorser, for the \$918 originally loaned, and that a plea setting up the above facts was good.

DECLARATION on a note, made by one Nourse, 6th January, 1862, to defendant or order, for \$1,230, payable in twelve months, with ten per cent. interest, and endorsed by defendant.

Plea, that under the will of Charles Nourse's father, the maker of the note sued on was entitled to considerable property and moneys, and before the same was realized and his share ascertained it was agreed between him and Corrigan, the acting executor, that the latter should advance, out of such expected moneys, and on account thereof, the sum mentioned in the note, and when his share should be ascertained such sum and interest should be taken into account and deducted therefrom, and that Nourse should make, and defendant endorse, this note to Corrigan, to secure any deficiency, &c., &c., which was done, and defendant was only surety; that long after it was due, and after Corrigan had in his hands much more of Nourse's share of the estate than would pay the note, it was given to plaintiff, as the receiver in Chancery of the Nourse estate, without value, &c.

The case was tried at Toronto, before Gwynne, J., and defendant was allowed to add a plea, to the effect that defendant endorsed the note as security for money to be advanced by the executors to Nourse, the maker, and no money, as they well knew, was advanced after the making of the note, &c., &c.

Nourse was examined under a commission, and swore he gave the note for money he was to get from Corrigan, the executor, on furnishing security in the event of his share not being sufficient; that he always understood his share to be worth very much more; that he told defendant he was to receive that amount, and defendant endorsed, as his surety, on that understanding; that he never got that amount from the executors, and in all only received \$918.73.

Corrigan's evidence went to shew that Nourse's share was not sufficient to meet any part of the note; that the \$918 had been advanced or lent to Nourse before the note was given, on the faith of his giving such an endorsed note; that the note was sent to him by post, and he was surprised to find it was for \$1,230 instead of \$918; that he could not account for its being for the larger sum, except on the idea that there would be, and that Nourse wanted to get, a further advance; and he (Corrigan) did not know

why the note was returned when it was for so much more than the amount advanced.

The learned Judge left the whole case to the jury, telling them that the burden of proof lay on defendant, and his charge was favorable to plaintiff.

Plaintiff's counsel objected to the plea being added, urged that it was bad, and was to be allowed to demur to it.

The jury found for defendant.

In Easter Term, *McMichael* obtained a rule on the law and evidence; that the verdict was perverse and against the judge's charge; that the judge should have directed verdict for plaintiff, and that there was no legal evidence for defendant; that the plea should not have been added; and that it was demurrable.

John Patterson shewed cause, citing *Solly v. Hindes*, 2 C. & M. 516; *Stone v. Compton*, 5 B. N. C. 142; *Brown v. Wilkinson*, 13 M. & W, 14; *Abbott v. Hendricks*, 1 M. & G. 791.

McMichael, contra.

HAGARTY, C. J.—If a man becomes surety or endorses a note for another, for the purpose of enabling the latter to obtain an advance of money from a third person, who knows that the security or endorsement has been so obtained, then, if the advance be not made, the surety or endorser would be discharged as to such third person, and the latter could not apply the note to a pre-existing debt against the maker, or as security for some new arrangement entered into between them, to which the surety was not a party.

It may not be very certain, on the evidence, whether the endorser, Perry, was told that the whole amount of the note was to be advanced by the executors to the maker, Nourse, or that he knew the actual state of things, and that Nourse had already received \$918, and was to receive the other \$300 on furnishing the security.

The plaintiff could hardly deny that, at least, the latter state must have been suggested to him, and that he gave

the endorsement in the belief that Nourse was to get the other \$300.

Corrigal's evidence leaves no doubt in my mind on that point. He says he was surprised at receiving by post the note for \$1,230, and could not account for it except on the idea that there would be a further advance, nor could he say why it was retained when it was found to be for the larger sum. It ought to have occurred to him that he ought not to keep a liability of a surety for several hundred dollars over and above any claim existing against the principal, at least, without proper enquiry.

I think that the surety has a right to say that he endorsed the note for Nourse to enable him to get the further advance, while he was giving security for the amount already advanced, and that the executors have no right to say to him that they will hold him liable for at least the sum Nourse already owed.

The case of *Stone v. Compton* (5 Bing. N. C. 142) is in point. Plaintiff advanced £2,600 to Cox on security of a mortgage by C., and a note for the same sum, in which defendant joined as surety. At the time of the advance Cox owed plaintiff £800, which was deducted from the £2,600; but the recital of the mortgage, read by the plaintiff's agent in presence of defendant, stated untruly that the £800 had been paid, but not disclosing the arrangement made as to it: *Held*, that this was a fraud in law which released defendant from liability. Tindal, C. J.: "We cannot see any sound legal distinction arising from the form of the security itself; that is, whether such security is taken in the form of a promissory note, or as an ordinary guarantee for the payment of the debt of a third person. * * * The entire sum of £2,600 was, by the private stipulation between the parties, not to be advanced or placed to the credit of Cox, but only that sum minus the amount of the debt due by Cox to plaintiff." He proceeds to say that the misrepresentation related to a fact material to the surety's interest, and the note was therefore void.

If defendant had signed a guarantee in these words, "In consideration of your advancing or loaning the sum of \$300 to C. Nourse, in addition to \$918 already loaned, I hereby guarantee the due payment of both said sums to you if he do not pay," it could not be argued that, if no further advance were made, the surety would be responsible for the \$918 already advanced.

I think the facts of the case before us, if set forth in a plea, without charging fraud, would amount to a defence.

It is not necessary to charge Corrigal with any fraud; but I do not see how he can be held not to have had notice that the surety had endorsed the note on the faith and understanding that Nourse was to have a further advance.

The plea, as amended, does not exactly meet the facts as I think they really appeared, but in substance it raises the defence that the note was endorsed to obtain a further advance for Nourse, which was not made.

We ought not to send the case again for trial on such a variance, which even now, perhaps, we might amend.

There is no suggestion of any more light to be thrown upon the case at a future trial, and I cannot say the jury have arrived at a wrong conclusion. I think the ends of justice will be best served by discharging the rule.

GWYNNE, J.—Upon a further perusal of the evidence I think that I left the case to the jury more favorably for the plaintiff than the evidence warranted. The evidence of the executor Corrigall, certainly, in some particulars is singular. Why this note for \$1,230 should have been made, when only \$918 was advanced, is not explained. That Nourse expected to receive the difference sufficiently clearly appears, and I cannot, upon re-consideration, say that there was no evidence to go to the jury on the added plea, or that the jury have drawn any erroneous inference from the evidence upon the issue joined upon it. The action is a hard one against the surety, and I agree with the Chief Justice in thinking that the verdict may be sup-

ported on the issue joined on the added plea, and therefore should not be disturbed. As to the demurrer to the plea, I think the plea is clearly sufficient in law.

*Rule discharged, and judgment for
defendant on demurrer.*

LISTER V. NORTHERN RAILWAY CO.

Wrongful seizure—Interpleader—Excessive damages.

Defendants caused plaintiff's goods to be seized under an execution against his father, believing them to belong to the latter. The goods in question consisted of some articles of machinery, metal, &c., in the upper portion of a shop where plaintiff carried on his business. The Sheriff did not take possession before the 20th, and an interpleader order was made on 29th January, and during part of this interval plaintiff was allowed to continue his business. The jury gave plaintiff \$1000 damages; but, *Held*, excessive, as no damages were recoverable after date of interpleader order, and a new trial was ordered, on payment of costs.

The defendants had recovered judgment and issued execution against David Lister, father of plaintiff, and on 6th January the Sheriff formally seized the goods claimed by plaintiff. They consisted of some articles of machinery and metal in a shop, where plaintiff carried on business, on an upper floor, in Bay Street, as a machinist. The Sheriff did not put any one in possession till January 20th, as he waited for instructions in consequence of plaintiff having claimed the goods. The goods seized were valued at a little over \$500. On the 29th January an interpleader order was made, after hearing the parties, directing an issue and the giving up the goods on security being given, &c. Security was given by the 6th March, but plaintiff did not resume his business. While the Sheriff was in possession the plaintiff was at first allowed to go on with his business, but he afterwards abandoned it.

The jury were told that damages were only recoverable up to the making of the interpleader order; but they found for plaintiff, \$1000.

Galt, Q. C., obtained a rule to set aside the verdict for excessive damages, to which *M. C. Cameron*, Q. C., shewed cause, citing *Price v. Severn*, 7 Bing. 317.

Galt supported his rule.

HAGARTY, C. J.—The portion of time for which defendants are liable was from January 20th to 29th, some eight or nine days, during a part of which the plaintiff was allowed to continue working. We cannot understand on what principle or calculation the jury found this large verdict for a very few days' interruption of a business in which the articles seized were worth only about \$500.

There is nothing in the evidence, as we read it, to shew that the defendants were not proceeding in good faith, believing the goods to belong to their debtor, David Lister.

The case of *Walker v. Olding* (1 H. & C. 621) explains the principle on which damages are restricted to the date of the interpleader order. Confining the plaintiff's claim, in this case, to the damage done from the 20th to the 29th January, we cannot see that a verdict for the temporary disturbance of the business and detention of the goods, to the extent of double their value, can be upheld. No evidence was properly receivable of any damage sustained after the interpleader order.

We have no desire to interfere with the right of jurors to assess damages. In one of the cases, cited by Mr. Cameron, *Price v. Severn* (7 Bing. 316), it is said, "Adams, Sergeant, who shewed cause, expressed apprehensions for the functions of jurymen, the liberty of the subject and the integrity of Magna Charta, if this rule should be made absolute." The court, undismayed by this, made the rule absolute, remarking, "We are not doing away with juries by ordering a new trial, but only sending the case to another jury." Tindal, C. J.: "I am as little disposed as any man to interfere with the province of a jury, and I should not be induced to send a case down again for excessive damages, except when those damages are enormous and disproportionate."

Smith v. Woodfine (1 C. B. N. S. 660) may be also referred to.

We think there must be a new trial, on payment of costs.

GWYNNE, J.—I think there can be no doubt that the jury have formed their estimate of damages upon an erroneous basis, and, entertaining that conviction, although the action is in tort, the ends of justice, I think, require that there should be a new trial. There is a case, decided in the Common Pleas, reported in the Weekly Notes of February 6th, p. 32, which has not been transferred to the Reports, *Walker v. The South Eastern Railway Co.*, which was an action in tort, and in which the court granted a new trial for excessive damages, under the following circumstances: The declaration contained three counts; 1st, for assault; 2nd, false imprisonment; 3rd, malicious prosecution. The evidence failed to support the 2nd and 3rd counts, but did sustain the 1st. The jury rendered a verdict on the 1st count for the plaintiff, with £170 damages. The court, *thinking it probable* that, in their estimate of damages, the jury had taken into consideration evidence which had been offered in relation to the charges contained in the 2nd and 3rd counts, directed a new trial.

That case is very applicable to this, for the verdict here appears inexplicable otherwise than on the assumption that the jury took into consideration the evidence offered by the plaintiff of damage alleged to have been sustained subsequent to the issuing of the interpleader order, which they were told they should altogether exclude from their consideration.

At a future trial it will be important to consider whether the evidence of damage offered by the plaintiff should be received at all, unless he can present his claim in such a shape as to exclude any mention of, or, at least any estimate in respect of, anything which took place after the issuing of the interpleader order. I think that too great liberty was given to the plaintiff, at the trial, of enquiring as to matters subsequent to that period, and

if it had been objected to I should have felt bound to have stopped the enquiry.

*Rule absolute for new trial, upon
payment of costs.*

BIRMINGHAM V. HUNGERFORD ET AL.

*Common Schools—Arbitration—Contract with teacher not under seal—C. S.
U. C. ch. 64, 23 Vic. ch. 49, sec. 12—Pleading.*

Held, on demurrer to the avowry and cognizance set out below, that there is no right to arbitrate under the Common School Acts (C. S. U. C. ch. 64), unless the contract of service is entered into by the trustees with the employee in their corporate capacity, and evidenced by their corporate seal; and unless the contract has been so entered into, the person discharging the duties of teacher has no legal *status* as such.

This was an action of replevin for plaintiff's goods, seized by defendant Hungerford, as bailiff, under a warrant issued by the other three defendants, who professed to act as arbitrators under the Common School Act.

The avowry stated that plaintiff, Birmingham, Alexander Graham, and Roderick Grant were school trustees, and Isabella McDougall was employed by them as a teacher, and performed the duties of teacher; but the written agreement between the said trustees and teacher was not sealed with the corporate seal, owing to one of the trustees (Birmingham) wrongfully refusing to affix the same and keeping it in his possession against the will of the remaining trustees; that differences arose between the plaintiff, Graham and Grant, as such trustees, on the one side, and said Isabella, as such teacher, on the other side, in regard to her salary and the sum due to her as such teacher, and the same was submitted to arbitration; that the trustees, after notice of an award (which was set out) and demand made, wilfully refused, &c., to perform the same and to pay the teacher the moneys awarded; after one month after demand elapsed the arbitrators issued warrant to

Hungerford (setting it out), and plaintiff's goods were seized.

This avowry was demurred to on many grounds, one being the invalidity of the alleged agreement with the teacher.

C. S. Patterson, for the demurrer, cited *Hughes v. Pake*, 25 U. C. 95; *Raney v. Macklem*, 9 C. P. 192; *Weaver v. Bull*, 10 U. C. 189; *Kennedy v. Burness*, 15 U. C. 473, S. C. 7 C. P. 227; *Kennedy v. Hall*, 7 C. P. 218; *Vanburen v. Bull*, 19 U. C. 633; *Reg. v. Tyendinaga*, 20 U. C. 528.

J. A. Boyd, contra, cited *Stevens Hospital v. Dyas*, 15 Ir. Chy. Rs. 405; *Reg. v. Kendal*, 1 Q. B. 366. The several statutes cited are referred to in the judgment of the court.

HAGARTY, C. J.—The act of 1860, ch. 49, sect. 12, says: "All agreements between trustees and teachers, to be valid and binding, shall be in writing, signed by the parties thereto, and sealed with the corporate seal."

The school trustees are created a corporation with a legal name, and hold all the corporate property (section 77 U. C. Consol. ch. 64), and by the section cited above they are formally to contract under their corporate seal.

If we attach any meaning to the clause cited we think it must be that a person can only become a common school teacher by agreement under seal, and that any other agreement, verbal or written, would not be an agreement for that purpose with the school corporation. In this view we do not see how Isabella McDougall ever became a school teacher within the meaning of the act.

It was argued before us that under the words of this act (section 84), "in case of any difference between trustees and a teacher in regard to her salary, the sum due to him, or any other matter in dispute between them," the very subject of dispute might be the not affixing the seal or completing a valid contract. The answer is, we think, obvious, that no person should expect to become a teacher under the school corporation, or should commence the per-

formance of any duties, with a view to remuneration from the corporation, without the essential preliminary of a contract under the corporate seal.

The moment it is settled that no agreement can be made except in the prescribed manner, there is nothing to bind the corporation in any matter or dispute between them and a teacher: no person has acquired the *status* of teacher.

If this person choose to give her services in teaching without any binding contract with the corporation, it may be possible that she has a remedy against any individuals who pledged their personal credit to her.

It seems clear to us that she is not a school teacher in the view of the act. If this be correct the whole of the proceedings fail, and no arbitration under this statute has taken place, and of course the plaintiff's property has been taken without legal warrant.

Nothing, in our judgment, turns upon the statement of the wrongful withholding of the seal by plaintiff.

The provision in the statute as to the kind of contract required is one of a very wholesome character, and we ought to give every reasonable effect to it.

If the trustees desired to comply with an award on them to pay money, if they had not available funds on hand they might have to levy a rate for the purpose. To do this they should be correct in their proceedings. Sub. 20, sec. 27, of ch. 64, directs them to exercise all the corporate powers vested in them for the fulfilment of any contract or agreement made by them.

In *Stark v. Montague* (14 U. C. 473) it was held that no rate could legally be imposed for paying the salary of an unqualified teacher (*i. e.*, uncertified), and that such a teacher could not legally receive any portion of the school fund. Section 80 says that no person shall be deemed a qualified teacher who does not, at the time of his engaging with the trustees, and applying for payment from the school fund, hold a certificate of qualification.

If the want of a certificate vitiates the rate, a similar reason would apparently avoid a rate levied to remunerate

a person who had served without any binding agreement with the school corporation. In neither case would the person be a duly qualified school teacher claiming money under contract with the trustees as such.

The late Mr. Justice Burns, in *Kennedy v. Burness* (15 U. C. 493), says : "A teacher may no doubt contract with the trustees, as such, personally on their part, and in such case they would be personally liable to carry out the contract. * * He can only invoke the extraordinary powers given for his protection, when he admits that his contract with the trustees is of such a character as that the school acts apply to it, and that it is made under them."

It is to be observed that this case was decided before the act of 1860, and its provisions respecting agreements under them."

We consider this objection fatal to the defence. It is therefore unnecessary to discuss the other.*

It is right, however, to notice the wording of section 9 of the act of 1860, on which defendants claim to have proceeded : "If the trustees wilfully refuse or neglect, *for one month after publication of award*, to comply with or give effect to an award of arbitrators appointed, as provided by the 84th section of the said U. C. C. S. Act, the trustees so refusing or neglecting shall be held to be personally responsible for the amount of such award, which may be enforced against them individually by warrant of such arbitrators *within one month after publication of their award*."

It would seem to be simply impossible to carry this section into effect. If they refuse for one month after publication they are to be liable, and award may be enforced against them by warrant *within* one month after publication.

This is another of those most unfortunate cases which have come before the courts in consequence of errors

* During this Term, the Court of Queen's Bench, held the avowry bad on the other objection taken by the demurrer, but not noticed in this judgment, in the case of *Graham v. Hungerford*, arising out of same arbitration.

naturally committed in the exercise of statutable powers to decide claims and issue executions otherwise than by regular legal process. A most arduous and dangerous duty is imposed on arbitrators, by directing them to issue their warrant for the seizure of property at the risk of being made trespassers for unintentional errors; but it is impossible to leave persons whose goods are forcibly and illegally seized without adequate remedy. The design for the avoidance of litigation and cost is most laudable; but experience demonstrates the almost impossibility of carrying it into successful operation. The substitution of the simple process of the Division Court (irrespective of amount) for the cumbrous and costly machinery of arbitration would remove all difficulty. The cost need be only a few shillings: here the costs mentioned in the award are \$25.

We have no course but to hold all the proceedings illegal, and that plaintiff is entitled to judgment.

GWYNNE, J.—The avowry and cognizance, which are demurred to, when epitomized, profess to justify the wrong complained of in virtue of a contract in the avowry and cognizance respectively alleged never to have been entered into so as to have any legal effect.

The proceeding under the statute 22 Vic. ch. 64, which can only constitute a justification where there is a preceding valid contract, cannot afford a justification, when the absence of such a contract is admitted in the pleadings. The demurrer therefore must be allowed.

Judgment for plaintiff on demurrer.

PHIPPEN V. HYLAND, ET. AL.

Sale of goods—Written contract—Construction—Evidence—Variance—Statute of Frauds—Default in payment—Right to recover back deposit.

Plaintiff sued defendants, charging in the first count of his declaration that defendants sold and plaintiffs bought 14,000 bushels of barley at a certain price, to be delivered to plaintiff, when called for, on board a certain vessel, to be paid for by plaintiff on getting receipt; that plaintiff then paid defendants \$200 on account and called for delivery, assigning, as a breach, the non-delivery of the barley. The evidence of the contract consisted of a writing, purporting to be a receipt, dated 29th September, 1868, signed by defendants, for \$200, which was therein stated to have been paid "as part margin" on a cargo of barley sold by defendants to plaintiff, to be delivered when called for, and to be paid for on getting the receipt of the captain of the vessel; and also another writing signed by both parties at the same time, but before the receipt was signed, and also bearing the same date, and being a memorandum of the sale of the barley in question, from which it appeared that the barley was to be delivered *on the following Thursday*, that the "margin" to be paid was \$1000, and that the residue (\$800) was to be paid by plaintiff on the same day that the \$200 were paid:

Held, that the two writings must be read as incorporated the one with the other, and that the true contract was to be deduced from reading both together, that the jury should have been so directed, and that plaintiff having failed to pay the \$800, balance of margin, on the day named, could not recover under the above count.

Held, also, that there was no substantial variance, for that reading the two together, the words, "to be delivered when called for," as contained in the second writing, might well mean within the time that had just been fixed by the first.

Per Gwynne, J., that the allegation of the payment of the two hundred dollars brought the case within the exceptions of the 17th section of that statute.

Quære, as to the right of plaintiff to recover back the two hundred dollars paid on account.

The first count of the declaration stated that defendants sold and plaintiff bought 14,000 bushels of barley at \$1.13, free on board, to be delivered to plaintiff, when called for, on board the schooner "Union Jack," and to be paid for by plaintiff on getting captain's receipt, and plaintiff then paid defendants \$200 on account and called for delivery of the barley on board: Breach, non-delivery.

2ndly. That on 29th September, 1868, defendants agreed to sell and plaintiff to buy a cargo of barley, 14,000 bushels more or less, at \$1.13 per bushel, to be delivered free on

board on or before Thursday then next, being the 1st of October, to be paid for, viz., \$200 at the making of the agreement and \$800 on the day of the date of the agreement, the same to be held as a margin on said cargo, and the remainder of the price on delivery of cargo; that at the time of making the agreement plaintiff paid \$200 on account, and was ready and willing to pay \$800 on the day of agreement, to be held as a margin; that defendants waived the payment thereof, and plaintiff was afterwards ready to pay, of which defendants had notice, and offered to pay, but defendants refused to accept; that plaintiff required defendants to deliver the barley after Thursday, but defendants refused.

3rd. Common money counts.

Pleas: To 1st count, denying the bargain; to 1st and 2nd, fraud; to 2nd and 3rd, denial of waiver, and that plaintiff was not ready to pay on day of agreement, nor did plaintiff tender on following day, nor did defendants then refuse to accept; to 4th, never indebted; to 5th, payment; to 6th, set off.

The case was tried at Toronto before Morrison, J.

The following paper (marked "A") was proved to be signed by defendants:

"TORONTO, 29th Sept'r, 1868.

"Received from S. H. Phippen \$200, being amount paid me as part margin on a cargo of barley, about 14,000 bushels, which I have sold him, F. O. B., at \$1.13 gold, said cargo to be delivered when called for on board the schooner 'Union Jack,' the said barley to be paid for on getting captain's receipt.

(Signed) "HYLAND & Co."

It was proved that before this was written defendants wrote the following paper:

"TORONTO, 29th Sept'r, 1868.

"I sell, and S. H. Phippen buys cargo barley, 14,000 more or less, deliverable on or before Thursday next, at \$1.13 F.

O. B., on which the said S. H. Phippen paid \$200 and will pay \$800 more to-day, the same to be held as a margin on the aforesaid cargo."

This plaintiff signed.

There was some discrepancy in the evidence as to what took place at the time. One witness said defendants handed this last paper (marked "B") to plaintiff, and told him to copy it, which he did, and defendants then said it was not the same and made some remark about Thursday, and the words "part margin" were inserted at defendants' request. Defendants' witness said that defendants wrote paper "B," plaintiff signed it and defendants told him to copy it, which he did. Plaintiff asked him to sign what he had copied, which defendants did sign without reading it.

It was clear that \$200 were paid to defendants, but no more money on that day.

On the next day (Wednesday), according to plaintiff's witness, plaintiff met one of defendants, and wished to pay him the balance he had to pay on the barley. Defendant said he was in a hurry, and put him off. Next day (Thursday) plaintiff tendered \$800 to defendant (Hyland), who said he would not take it then, and arranged to meet him that evening. They met, and defendant proposed several modes to settle; amongst others offered \$100 in full settlement; but they did not settle.

At the close of plaintiff's case, counsel for defendants objected that first count not proved, and urged that paper "B" was part of the contract, or shewed the true contract. As to 2nd count, no evidence of waiver, and no tender of payment on Tuesday.

Leave was reserved to enter verdict for defendants on 1st count.

While the learned judge was explaining the pleadings to the jury, plaintiff's counsel said he elected to go on the 1st count, on paper "A." It was then left to the jury to say if that paper was the true contract, or whether (as defendant asserted) he only signed it thinking it was the same as paper "B," and so was fraudulently imposed on; if so,

to find for defendant; but, if "A" was the true contract, then, whether it was broken, and to find the damage, &c. Defendants' counsel renewed the former objections, and urged that the contract on 1st count should not be left to the jury as a substantive contract, but as one incorporated with the other contract, and that both together contained a patent ambiguity or variance, and so the count was not proved.

Counsel for plaintiff, at the end of the case, contended he was entitled to recover the \$200 paid, besides the other damage. This was left to the jury, and leave reserved to defendants to move to reduce by that amount, or, if not given by jury, leave to plaintiff to move to increase by that amount, and, if jury found for plaintiff on 1st count, leave reserved to defendants to move to enter nonsuit or verdict for defendants on that count.

The jury found for plaintiff on 1st count, and \$1,120, stating that as to the \$200 they left it to the court. On the other counts they found for defendants.

In Hilary Term, *Harrison*, Q. C., obtained a rule to increase the verdict by the \$200, on the leave reserved; and *McMichael* obtained a rule to enter verdict for defendants on similar leave, on the law and evidence, for misdirection, and for variance in this, that receipt "A" referred to a margin, of which it formed part, and the contract was contained in paper "B," first signed, modified by receipt "A;" that the jury should have been told the contract was ambiguous, contradictory, and void; that a plea, attached to the record, offered to be added at the trial, should have been allowed by the learned judge; and for excessive damages, and on affidavits; or to reduce the verdict to such sum as to court might seem meet.

Defendant Hyland swore that he signed paper "A" in the belief that it was a copy of "B," and that \$800 were to have been paid that day. Plaintiff, in answer, swore that defendant's statements were untrue, except that he did not deny that the \$800 were to be paid that day.

Both rules were argued together.

R. A. Harrison, for the plaintiff, cited *Sarl v. Bourdillon*, 1 C. B. N. S. 182; *Smith v. Neale*, 2 C. B. N. S. 67; *Bailey v. Sweeting*, 9 C. B. N. S. 843; *Gibson v. Holland*, L. R. 1 C. P. 1; *Roots v. Rixley*, L. R. 3 Ex. 62; *Koster v. Holden*, 16 C. P. 331, S. C. 17 C. P. 139; *Canham v. Barry*, 15 C. B. 597; *Ritchie v. Vangelder*, 9 Ex. 762; *Brennan v. Howard*, 1 H. & N. 138; *Mayne*, Damages, 80.

McMichael, contra, cited *Goldshed v. Swan*, 1 Ex. 154; B. & L. Prec., last ed., 61; *Leach v. Thompson*, 18 C. P. 141.

Harrison was heard in reply.

HAGARTY, C. J.—The contract relied on by plaintiff at the trial is that contained in the paper A, signed by defendant. Had that contained the whole bargain between the parties, there would have been no question or difficulty about the payment or non-payment of the \$800, apart from the whole price of the barley, which was to be paid for on getting the captain's receipt.

Without the aid of the paper B, there is abundant evidence that plaintiff considered he had to pay \$800 to defendant before getting the barley, otherwise all his subsequent attempts to tender it and get defendant to accept it would be wholly unmeaning; and in his affidavit, filed in answer to that of defendant, which charges that this sum was to be paid on day of bargain, he does not deny it. The evidence of plaintiff's witness (McDonald) is also clear on that point.

The paper A speaks of the \$200 received as "part margin" on the cargo of barley sold. The term "margin" is explained to mean a kind of caution money or guarantee to protect the seller if the article should fall in value and vendee make default. Calling the \$200 "part margin" would indicate the existence of a residue of a margin, yet remaining to be paid, apart from the general contract price.

But the first paper drawn was that called B, which the plaintiff signed. That varies from A by speaking of the

barley as deliverable on or before Thursday next, instead of "when called for;" and says that plaintiff paid \$200, and will pay \$800 more to-day, the same to be held as margin, &c.

We may understand the case better by considering paper B as probably containing the first and actual agreement between the parties when it was written, and when defendant told plaintiff to copy it out. If both had signed paper B alone the bargain would be quite clear. Then defendant signs a receipt, acknowledging to have received the \$200 as part margin. So far this would be quite intelligible. Then it proceeds, "to be delivered when called for on board schooner Union Jack." Having just the instant before agreed that the barley was to be delivered on or before Thursday next, it is no strain on the meaning of paper A to hold that "to be delivered when called for" meant within the time just fixed by the paper "B."

Paper "B" gives quantity, price, provides for payment of "margin," and time within which delivery is to be made. Plaintiff signs this. Defendant then gives him, in paper "A," a receipt for the \$200 as part of the margin, and specifies the name of the vessel on which it is to be delivered when called for. Viewed in this light there would hardly be any substantial variance, reading the two documents together in the order of their execution.

I am unable to see on what principle plaintiff can be allowed to ignore his own written statement of the bargain, and of the manner in which he was to pay the "margin." He has declared what the "margin" was and how it was to be paid, and defendant's receipt for the money paid down, stating it to be as part of the "margin," does not, in my judgment, entitle plaintiff to say he was not bound to pay any more till delivery, or to recover on a contract as set out in his first count.

If the paper signed by defendant, on which it is sought to charge him, had been wholly silent as to the manner in which the price named was to be paid, there would still, I

presume, be a sufficient memorandum in writing, even if a mode or time of payment had been also agreed on: see *Sarl v. Bourdillon* (1 C. B. N. S. 188); but if the vendee had at the same time signed a paper that he was to pay half or a quarter of the stipulated price within twenty-four hours, I do not think it possible that he could still insist that the whole bargain was contained in the paper signed by vendor, and his (vendee's) agreement not to be considered as part of the contract: see *Webb v. Spicer* (13 Q. B., in Error, 894); *Canham v. Barry* (15 C. B. 621).

In the case before us this agreement by plaintiff, to pay the \$800 that day, is not inconsistent with defendant's written contract, for the reasons already mentioned.

I think it should have been left to the jury to say whether, as was in substance asked by defendant at the trial, paper "A," assuming it to have been without fraud signed by defendant, was not to be considered as referring to or incorporated with paper "B," and the true contract to be gathered from both. I hardly think it possible to read these papers and the oral testimony without being satisfied that plaintiff was to pay the \$800 on that day, and that he failed so to do. In that view of the case the first count, on which plaintiff elected to proceed, cannot be supported.

As to the \$200, it was not claimed at the trial as recoverable on the ground of failure of consideration, or refusal of defendant to complete his bargain. We can find no trace in the learned Judge's notes of his being asked to give any direction on the subject. We find a leave reserved to plaintiff to move to increase his damages by that sum, and leave to defendant to move to reduce the damages by that sum, if the jury should give it. The plaintiff claiming, as he was, large damages for the alleged failure to deliver the barley, did not perhaps think it prudent to ask the return of his \$200 as on a consideration that had failed.

In neither of the leaves reserved does this question come before us. The jury have given damages for the non-delivery, but have expressly omitted the \$200. There is no finding one way or the other as to this sum.

We consider the plaintiff's case, as brought forward at the trial, to have failed, and the first count in the declaration to be not sustained. There is a verdict for the defendants on the money counts, which we have no power to alter to a verdict for plaintiff.

We think we should direct a verdict to be entered, on the leave reserved, for defendant, on the first count.

As no question was raised on the trial on the common counts, we would allow them to be struck out of the record, if plaintiff so desire, so as not to finally bar his raising the question before a jury of his right to recover the \$200.

It is a question not free from difficulty, and one not to be disposed of on a collateral proceeding. There is very little authority bearing directly on the point, although we find it often laid down that a plaintiff cannot make his own default the ground of an implied promise to pay money to him. Most of the cases refer to claims to recover a deposit paid on a contract for the purchase of real estate. The money paid here as "margin" would probably stand much in the same position. Lord Campbell says, in *Ockenden v. Henley* (El. B. & El. 592), "It is well settled by our law, following the rule of the civil law, that a pecuniary deposit upon a purchase is to be considered as payment in part of the purchase money, and not as a mere pledge.

In *Palmer v. Temple* (9 A. & E. 514) Sir J. Campbell and Sir W. Follett, in arguing, say, "The deposit is by way of indemnifying the seller against the breach of the agreement, with the understanding that, if the agreement be carried into effect, the money shall go in part payment, and if not, it shall be retained as an indemnity." The case is very peculiar in its facts. It was for the purchase of an interest in land, and after purchaser had failed as to some acts to be done by a certain day, vendor sold the property to another. Purchaser sued for not completing the agreement, and also to recover his deposit of £300, paid when bargain made. All the issues as to the performing the bargain were found against him. As the second sale by vendor did not take place till a few days after the bringing of the

action, the plaintiff failed and then brought a second action for money had and received and recovered. There was a written contract, providing that if either party made default there should be a penalty of £1000.

Lord Denman's judgment is not very distinct on the main point before us. He says there is no authority quoted either from report or text book ; that there was generally a clause in agreements that deposit should be forfeited on failure of the person paying it, and " this was so common a practice that it is highly probable the general question may never come to be decided ;" * * that in the absence of any specific provisions the question, whether the deposit is forfeited, depends on the intent of the parties, to be collected from the whole instrument ; that as there was the £1000 penalty, it was clear no other remedy was intended ; that vendors might sue for the penalty and get such damages as a jury might give, but he cannot retain the deposit, for that must be considered, not as an earnest to be forfeited, but as part payment. " But the very idea of payment falls to the ground when both have treated the bargain as at an end, and from that moment the vendor holds the money advanced to the use of the purchaser."

This judgment hardly disposes of the question : *Campbell v. Grier* (10 C. P. 295) and again 11 C. P. 231, and *DeLong v. Oliver* (26 U. C. 612) are against the right to recover money paid by an intending purchaser, when he is unable to continue his payments. Draper, C. J., says, in the former case, " The abandonment of the agreement arose from the plaintiff's inability to fulfil it, and no implied promise on defendant's part to refund the deposit could arise on such a ground any more than if plaintiff had directly refused to fulfil his engagement." In both these cases the defendant had been willing to perform his part of the contract, but had afterwards sold the land to another.

In *Sugden V. & P.* 14 ed. 40, the subject is discussed. After noticing *Palmer v. Temple* it says, " the question will then remain, whether the seller's resale of the estate will give the purchaser a right to rescind (viz., to recover the

deposit). It would seem not, if the sale was after the purchaser's default, for, as the purchaser by his act had lost the right to enforce the contract, the disposal of the estate by the seller prejudiced no right of the purchaser, and could impart to him no right to rescind a contract which he had already *broken*. The sale does not purge the previous default of the purchaser. * * If, therefore, in consequence of the purchaser's default, the seller is at liberty to resell for his own profit, he does a lawful act, from which no damage results to the first purchaser, and which, it should seem, cannot revive in the latter a right to recover the deposit which did not exist before the second sale."

It is to be understood that we give no judgment on this part of the case, as it was not argued before us, nor have we power to direct a verdict one way or the other.

It will be for the parties to consider whether further litigation may be advisable in the state of the law indicated by the authorities referred to.

GWYNNE, J.—The case appears to me to be susceptible of a very simple solution. The plaintiff alleges in this, his first count, a contract not required by the Statute of Frauds to be in writing. The payment of the \$200, alleged to have been paid by the plaintiff on account, at the time of the contract being entered into, brings the case within the exceptions to the 17th section of the statute. The plaintiff, therefore, might have proved his case without the production of any note or memorandum in writing of the contract. He has, however, produced a writing, which purports to be a receipt, dated the 29th September, 1868, signed by the defendant, for \$200, which sum is stated in the receipt to have been paid "as part margin" on a cargo of barley sold by defendant to plaintiff. He also produces a writing, signed by himself at the same time, but before the signing of the receipt, and also bearing date the same 29th September, whereby it appears that the "margin," which was agreed to be paid by the plaintiff to the defendant, was \$1,000, and that the residue, namely \$800, was agreed to be paid by the plaintiff on the same day. Now,

under these circumstances, can there be any doubt which of these documents contains the contract between the parties? or whether the instrument first signed, although signed by the plaintiff alone, is not the contract involving the sale referred to by the defendant in his receipt? or whether that document is not just what it professes to be, namely, a receipt for a smaller sum, part of a greater sum, agreed by the plaintiff to have been paid to the defendant, as "margin," upon a contract between them for the purchase and sale of barley? Or can there be any doubt that the plaintiff's own written statement of what the contract was, produced by himself, may be used by the defendant to disprove the contract, as set out in the first count, and to explain what is that whole sum denominated "margin" in the receipt, part payment of which the receipt acknowledges? In so far as there is any difference between the two papers, by reason of the words "to be delivered, when called for, on board schooner 'Union Jack,'" in the one, and "deliverable on or before Thursday next F. O. B.," in the other, this is a difference quite reconcileable with the construction that both together contain the whole contract. It is sufficient, however, to say that the receipt produced by the plaintiff, as evidence of the contract alleged by him in his first count, does not prove it; for the substance of the allegation in the first count is, that by the contract therein alleged, no more than the \$200 paid on account was to be paid until delivery of the barley, whereas the receipt shews otherwise; and, although the receipt does not shew what the residue of the margin was, the other document, produced by the plaintiff with the view of supporting his second count, does, and in effect establishes that no such contract as that alleged in the first count ever was made between the parties, and I know of no rule which debars a defendant of the benefit arising from the fact of a plaintiff disproving his own case.

Rule absolute to enter verdict for defendant on first count, and to strike common counts from record; and plaintiff's rule discharged.

GOOLD V. SMITH.

Administrator durante minori ætate—C. S. U. C. c. 32, s. 5—Widow of deceased competent witness.

In an action by the administrator of the husband *duranti minori ætate* of the widow, *Held*, that the latter was not an inadmissible witness under C. S. U. C. ch. 32, sec. 5, as was one in whose "immediate or individual behalf" the action was brought.

This action was brought by the plaintiff, as administrator of the personal estate, &c., of Joseph Smith, the younger, deceased, during the minority of Lucinda Smith, his widow, an infant within the age of twenty-one years, against the defendant, who was the father of Joseph Smith. The declaration contained six counts, one in trespass, one in trover, and the common counts in respect of matters alleged to have taken place in the life-time of the son, and similar counts in respect of matters alleged to have taken place since his death.

The deceased was a young man of about twenty-two years of age at the time of his death, and who, with his wife and child, lived in his father's family. The question before the jury was, whether certain property, the subject of the action, was the property of the son, or, on the contrary, as was contended by the defendant, with some trifling exceptions, the property of the father. The case was tried before the judge of the County Court of Norfolk, sitting for the Chief Justice of the Queen's Bench. The jury rendered a verdict for the plaintiff and \$298 damages.

James Patterson obtained a rule *nisi* to set aside this verdict, as against law and evidence, and for misdirection. There were several points stated in the rule some of which did not appear by the judge's notes to have been made at the trial; but the only one material to notice was, that the learned judge improperly admitted the evidence of the widow of the deceased, Joseph Smith, in whose behalf it was contended the action was brought, and rejected the evidence of one Silverthorne, offered by the defendant.

Anderson shewed cause, and *Patterson* supported the rule.

GWYNNE, J., delivered the judgment of the court.

It was contended that Lucinda Smith, the widow of the deceased, to whose minority alone the authority of the plaintiff, as an administrator, as appears by the record, was confined, was an incompetent witness, upon the contention that in such case she was a person upon whose immediate or individual behalf the action was brought. This contention was founded upon a passage in Wms. Exrs., 6th ed. 469, which says that an administrator *duranti minori ætate* has no interest or benefit in the intestate's estate, *but in right of the infant*. By reference to Bac. Abr. Exrs., B. 1, which is the reference in support of this dictum, it is said, "that though an administrator *duranti minori ætate* hath but a limited and special property in the estate of the deceased, yet he may do all acts which are incumbent on an executor and which are for the advantage of the infant and the estate of the deceased; but he cannot do anything to the prejudice of the infant; therefore he cannot sell the goods of the deceased any further than are necessary for the payment of the debts; nor can he sell a term of years during the minority of the infant, for the words of his authority are, *administrationem omnium et singulorum bonorum ad opus commodum et utilitatem executoris durante minori ætate, et non aliter, nec alio modo committimus*."

So in *Skinner*, 155, *Lord Grandison v. Countess of Dover*, it is said the administrator, *duranti minori ætate*, is not within the statute of Henry VIII., but is a trust reposed in the Ecclesiastical Court and executed in right of the infant, and intended his administration, he not being able to execute it himself. But, notwithstanding that it is in the right of the infant that the Ecclesiastical Court grants letters of administration to a stranger to the deceased's estate, *duranti minori ætate*, we do not think that the infant, who, if of age, would be entitled to the adminis-

tration, is a person within the meaning of 22 Vic. ch. 32, sec. 5, and disqualified from being a witness, as a person on whose immediate or individual behalf the action is brought. For the purpose of paying the debts of the intestate such an administrator has as absolute control over the estate, as to all assets properly reducible into his hands for administration, as a general administrator. He can sue and be sued, and the assets, when recovered by suit, are in his hands for administration in the same manner as assets recovered by suit by a general administrator. This particular action, therefore, cannot be said to be brought for the immediate or individual behalf of the infant. The infant has no immediate or individual interest in the subject matter of the suit; and although in one sense it may be said to be brought on her behalf, in this, that it is because of her incompetency to take the grant that the Surrogate Court has granted administration to the plaintiff, yet it can only be said to be on her behalf as a person, who, if of age and so competent to receive the grant, would receive it only herself as a trustee for others, and so the principle of *McMullin v. Murdoff* (19 U.C. 506) applies. If she should die before coming of age, neither she herself before that time, nor her personal representative after her death, could claim any immediate or beneficial interest in the subject of the suit: all that she ever could claim would be, as next of kin, a share in the distribution of the intestate's estate, or a right to call the plaintiff to an account of his administration after she shall come of age and shall receive letters of administration granted to herself. We think therefore that she is not excluded from being a witness under sec. 5 of 22 Vic. ch. 32.

NOTE.—The rule, however, was made absolute for the rejection of the evidence of Silverthorne, though the point involved contained nothing requiring to be reported.—REPORTER.

ROYAL CANADIAN BANK V. KELLY.

Mortgagor and mortgagee—27 & 28 Vic. ch. 31—Distress for interest—Goods of third parties—Pleading.

To an action of replevin, charging a distress of plaintiff's goods, defendant avowed setting out a mortgage made to him by one D., and which was pleaded as having been executed in pursuance of the act respecting short forms of mortgages, and averred that under the proviso therein the mortgagor was possessed of the premises, and occupied and enjoyed same as tenant of the mortgagor, and so continued to do until at and after said distress; that mortgagor made default in payment under the terms of the mortgage, but mortgagee did not enter by reason thereof, but permitted mortgagor to continue in occupation as his tenant as aforesaid, avowing the taking of plaintiff's goods as distress for arrears of interest:

Held, on demurrer, good; for that the occupation of the mortgagor under the terms and conditions of the mortgage set out constituted the relationship of landlord and tenant between the parties at a fixed rent, being the interest on the principal sum secured; that so long as such occupation continued with the will of the mortgagee he had the right to distrain for such interest "by way of rent reserved," and incident to that right was the right of distraining upon the property of third persons on the lands mortgaged; that the continuance of the mortgagor in possession, after the day named for payment, with the permission of the mortgagee, constituted him thereafter tenant at will of the mortgagee, and on the terms of distress contained in the mortgage.

This was an action of replevin, the declaration in which will be found reported in 19 C. P. 190.

Avowry and cognizance, that before the alleged taking, and at the time of making the mortgage hereinafter mentioned, the mills, lands and tenements in the declaration mentioned were the soil and freehold, and were in the actual possession, of Dewey, and said Dewey executed to defendant Kelly a mortgage in fee, in pursuance of the Act respecting short forms of mortgages, of the mills, lands and tenements in the declaration mentioned, subject to a proviso for redemption on payment of \$25,000 and interest, on or before 1st February, 1867, and containing the clauses in the first schedule of the said act, numbered respectively 4, 5, 6, 7, 8, 14, 15 and 17, (setting them out as in the schedule). The avowry then went on to allege that Dewey, in pursuance of the last mentioned proviso (clause 17), entered and was possessed of said mills, lands and tenements, and had held, used and so continued to have, hold, &c., until

and at and after the said alleged taking ; that said Dewey made default in payment of the interest reserved by said mortgage, and did not at any time pay any interest, and said Kelly did not enter into said mills, lands or tenements by reason of such default, but permitted said Dewey to continue to have, hold, &c., as his tenant as aforesaid ; and at time of alleged taking, and while said Dewey so continued to hold and possess said mills, lands and tenements, a large sum for interest was still due and in arrear from said Dewey to said Kelly, wherefore said Kelly well avowed, &c. :

Demurrer :

1. That the only demise or tenancy shewn in or by said avowry or cognizance was that created by the mortgage, and it appeared by said avowry and cognizance that default had been made in payment of the mortgage money, and the demise thereby determined more than six months before the distress in the declaration mentioned.

2. That although it appeared that the alleged demise to Dewey had been determined by default in payment of mortgage before distress, yet it was not alleged that said Dewey was in fact actually in possession of the premises, where the distress was made, at time of making thereof.

3. That no other demise or lease than that implied from the covenants in the said mortgage was set out or shewn in said avowry or cognizance, and that defendants had no legal right or authority under any circumstances to distrain after six months from default, nor at any time after default, unless said Dewey (the mortgagor) was at the time of the distress in actual possession, which was not shewn.

4. That at all events the covenant or power to distrain, contained in said mortgage, constituted a mere license by said Dewey, the mortgagor, and did not authorize or legally empower the mortgagee, his bailiffs or agents, to distrain the goods of a stranger or third party on the lands.

5. That it was not shewn that the terms of the pretended power of distress contained in the covenant in the said plea set out, were followed or pursued, in this, that it

was not alleged in said plea that defendant Kelly ever issued a warrant of distress, or that the other defendants acted under any such warrant.

6. That it was not sufficiently shewn by said plea that said goods were in and upon said lands, or any of them, at time of seizure and taking thereof in declaration mentioned.

7. That if any tenancy whatever could be implied or be held to have been created or arisen after default in the mortgage, it was not averred or shewn in, nor did it appear from said avowry and cognizance, that any specific rent was agreed upon between Dewey and defendant Kelly, or that any specific (or any) rent was reserved on such supposed tenancy, which could legally authorize defendants to distrain plaintiff's goods.

R. A. Harrison, Q.C., for the demurrer, cited *Doe Dixie v. Davis*, 7 Ex. 69; *Morton v. Woods*, L. R. 3 Q. B. 658; *Knight v. Bennett*, 5 B. & Al. 322; *Doe Rogers v. Pullen*, 2 B. N. C. 749; *Chapman v. Beacham*, 3 Q. B. 723.

Patterson, contra, cited *Gray v. Bompas*, 11 C. B. N. S. 520; *Doe Thomas v. Field*, 2 Dowl. 542; *Turner v. Barnes*, 2 B. & S. 435; *Marquis of Camden v. Butterbury*, 5 C. B. N. S. 808.

GWYNNE, J., delivered the judgment of the court.

The avowry and cognizance here demurred to has been pleaded in pursuance of the judgment in this case, reported in 19 U. C. C. P. 196.

The mortgage is pleaded as having been executed in pursuance of the Act respecting short forms of mortgages (27 & 28 Vic. ch. 31), and it contains the clauses in the first schedule of the act, numbered, respectively, 2, 4, 5, 6, 7, 8, 14, 15 and 17. The avowry avers that, in pursuance of the proviso in the mortgage, the mortgagor was possessed of the premises and occupied and enjoyed the same as tenant of the mortgagee, and so continued to occupy and enjoy the same until and at and after the distress levied; that at the time limited in the mortgage for pay-

ment of principal and interest the mortgagor made default, but that the mortgagee did not enter by reason of such default, but permitted the said mortgagor to continue to have, hold, occupy, possess and enjoy the same as his tenant, as aforesaid ; and the mortgagee avows, and the other defendants acknowledge, the taking of the goods and chattels on the premises mortgaged, as a distress for arrears of interest on the principal sum secured by the mortgage, for two years next ensuing the date of the mortgage.

The occupation of the mortgagor, under the terms and conditions of this mortgage, constituted, in my opinion, the relation of landlord and tenant between the mortgagor and mortgagee at a fixed rent, such rent being the interest named in the mortgage as the interest accruing on the principal sum secured. That such was the intention of the parties appears to me to be the true construction to put upon the instrument as pleaded in the avowry. So long, then, as such occupation continued in accordance with the will of the mortgagee, he has, in my opinion, the right to distrain for the interest secured by the mortgage, "*by way of rent reserved*," and incident to that right is the right of distraining upon the property of third persons on the lands comprised in the mortgage. The authorities, which have led me to this conclusion, are collected in my former judgment in this case, to which I add *Hitchman v. Walton* (4 M. & W., p. 413). Assuming the tenancy, created by the mortgage, to have been for a determinate time, *until* the day named for payment of principal and interest, the continuance of the occupation of the mortgagor, by the permission of the mortgagee, constituted the mortgagor a tenant thereafter at the will of the mortgagee, and such tenancy must be held to be on the terms of distress contained in the mortgage. It seems to me to be the interest of the mortgagor, as well as of the mortgagee, that this should be the construction to be put upon the instrument. In that case the statute 8th Anne, ch. 14 does not apply : *Beaven v. Delahay* (1 H. Bl. 5), and *Knight v. Bennett* (3 Bing. 361).

I am of opinion, therefore, that the demurrer to the avowry should be overruled.

Judgment for defendant on demurrer.

BROUGHTON V. THE CORPORATION OF BRANTFORD.

Master and servant—Corporation—Appointment at annual salary—Dismissal during year—By-law—29 & 30 Vic. ch. 51, sec. 177.

The property of the Grand River Navigation Co. having passed into the hands of defendants, a municipal corporation, plaintiff was appointed manager thereof by an instrument under their common seal, at an annual salary, from 1st January, 1866, an appointment to which he had been previously recommended in a report of a committee of council, and by a resolution of the same body the mayor was authorized to execute the necessary bonds between plaintiff and defendants: *Held*, a valid appointment, and not necessary to have been made by by-law. Defendants having dismissed plaintiff in September, 1867, *Held* that such dismissal, *before the end of the year*, was wrongful, defendants having recognized plaintiff as their officer after and during the second year, and, until removed, he was to be considered as in office under his original appointment under the corporate seal, and that he was entitled to compensation in like manner as if employed by an individual. *Held*, also, that plaintiff was an officer of the corporation under the Municipal Act.

THIS was an action on a covenant by defendants engaging plaintiff as manager of the Grand River Navigation Company for a year, from 1st January, 1867, at \$900 salary, with a promise to retain for a year, charging a wrongful dismissal before the end of the year. The declaration also contained common counts.

Pleas—1. *Non est factum*. 2. Denial of dismissal 3. Traverse of readiness to remain. 4. Wilful disobedience by plaintiff of order, and justifying dismissal therefor. 5. Never indebted. 6. Payment. 7. Set-off. 8. Insolent and improper behaviour of plaintiff justifying dismissal.

The case was tried at Brantford, before Richards, C. J., without a jury.

An instrument, dated 1st January, 1866, executed by plaintiff, by two sureties, and by defendants under their

common seal, was proved. It recited that plaintiff for several years was receiver and manager of the works of the Grand River Navigation Company, which were the defendants' absolute property by foreclosure ; that he had duly accounted for all moneys received, and it had been agreed that his bond, with sureties, should be cancelled, and that he should be continued manager at a salary of \$900 per annum, commencing 1st January, 1866, and should give a bond to defendants for duly accounting, &c. Then came the conditions therefor by the sureties, and then a discharge by defendants of plaintiff and his sureties from the former bond. The mayor and town clerk signed the instrument, to which the seal was attached. A resolution of the council was proved, passed 19th March, 1866, that the mayor be authorized to execute the bonds between plaintiff and town, and to see that same were properly executed by plaintiff and his sureties. Another resolution was passed 30th September, 1867, that plaintiff be dismissed from the office of manager of the Grand River Navigation Company. Plaintiff remained in defendants' employ from his appointment during 1866 and for the first nine months of 1867, when he was dismissed. His salary was paid monthly.

A good deal of evidence was given as to plaintiff's conduct, justifying his dismissal, and the learned Chief Justice decided that it was not justified.

It was objected for defendants : That the bond did not shew a hiring from 1st January, 1867, as alleged, nor a yearly hiring, or anything beyond 1866 ; that there was no by-law appointing plaintiff ; that he was liable to dismissal at any time ; no authority to affix the seal to the bond, nor to appoint beyond one year ; that he did not shew readiness to serve as alleged, nor that he was out of employment ; that, if plaintiff was not an officer under the Municipal Act, the seal could not be properly affixed.

Leave was reserved to move nonsuit on these points.

The learned Chief Justice allowed plaintiff \$50 a month for the three last months of 1867 from his dismissal, the

full amount being \$75, deducting one-third under the circumstances.

In Easter Term, *Hardy* obtained a rule on the leave reserved, to which *M. C. Cameron*, Q. C., shewed cause. He cited *In re Macpherson and Beeman*, 17 U. C. 99; 1 *Addison*, Contracts, 6th ed. 365.

Hardy, contra, cited *Williams v. Byrne*, 7 A. & E. 177; *Collier v. Beeston*, 4 Bing. 309; *Wallis v. Warren*, 4 Ex. 361; *Regina v. District of Gore*, 5 U. C. 357; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

The statutes relied on are referred to in the judgment.

HAGARTY, C. J., delivered the judgment of the court.

By statute 14 & 15 Vict. ch. 151, defendants were allowed to lend £40,000 to the Grand River Navigation Company, assessing their property to pay the interest, &c., and issuing debentures which, by section 5, were to have the effect of a mortgage, and being represented on the board by two directors, &c. This mortgage was afterwards foreclosed (8 Grant, 246), and the property passed into defendants' hands.

It is not expressly directed by the statute that such an officer as the plaintiff must be appointed by by-law, and I do not feel it necessary so to limit the exercise of this power. We find an instrument (spoken of as a bond) under the defendants' common seal, reciting that plaintiff had been manager for several years, and an agreement that he should be continued in such position at a salary of \$900 per annum, commencing 1st January, 1866. We find a report of a committee of council to the whole body, in December, 1865, recommending plaintiff's appointment at this salary. We also find a resolution of the council authorizing the mayor to execute the bonds between plaintiff and the town.

This, therefore, appears to us to constitute a valid appointment, binding on a municipal body like defendants. The evidence discloses nothing to impeach the instrument in its execution. We therefore find the plaintiff filling an office at

a fixed annual salary, an office of that rank that would, in ordinary cases between individuals, be considered as the subject of a hiring by the year. It was, we think, certainly valid for one year, even if the council of a succeeding year might refuse to confirm it, and decide on removing the plaintiff. Plaintiff held the office and received the salary during 1866, and also during the first nine months of 1867, recognized by the council as holding the office (see the proceedings of the committee of council during 1867), and, at last, by resolution of 30th September, 1867, formally dismissed therefrom.

It appears to us that up to the date of dismissal he held the office under and on the terms of his original appointment. Section 177 of the Municipal Act of 1866 declares "that all officers appointed by a council shall hold office until removed by the council."

This point is noticed in *Township of Beverly v. Barton* (10 C. P. 182), in the case of a defaulting treasurer, where it was insisted that the appointment was an annual one. The case was under a somewhat similar clause in the Municipal Act of 1849.

Assuming, then, that plaintiff, in 1867, continued an officer of the corporation, appointed under their seal, and that his office was such as was usually the subject of a yearly hiring, could he be dismissed during the year at the defendants' pleasure?

My impression is, that unless he held the appointment at the yearly salary under the corporate seal, that he could be so dismissed, and that his claims would be limited to compensation for services actually rendered. I think the executory contract to continue him for the year would not be otherwise binding on a municipal corporation, whatever it might possibly be in the case of a trading corporation, in a matter within their ordinary business.

Without plunging into the mass of cases on this head, I will merely refer to *Pim v. The Municipal Council of Ontario* (in Error, 9 C. P. 302); and *Whitehead v. The Buffalo and Lake Huron Railway Company* (in Error, 8

Grant, 214), where the distinction between executed and executory contracts is pointed out.

As I consider that plaintiff remained up to the date of his dismissal the defendants' officer, under their corporate seal, I think he is entitled to compensation for a wrongful dismissal, in like manner as if employed by an individual.

I see nothing, in the objection, that he was not defendants' officer under the Municipal Act. He was employed to superintend this navigation business, which had in due course of law become part of the estate of the corporation ; nor do I think we can give effect to the objection that he did not shew readiness to serve, as alleged, nor that he was out of employment.

There was no pretence, in the evidence that he consented to leave defendants' service, or that his retirement was voluntary ; and as to his not being out of employment, the learned Chief Justice took a very temperate view of the damages, deducting one-third from the full salary for the three remaining months of the year.

Hackster v. De La Tour (2 El. & Bl. 678) explains the principle on which damages should be ascertained under all the circumstances of each case.

We see no reason to interfere on the merits, nor was it seriously pressed on us in argument that we should do so.

I think this rule should be discharged.

Rule discharged.

ROYAL CANADIAN BANK V. YATES.

Principal and surety—Clerk or teller in Bank—Pleading.

The declaration set out a deed executed by plaintiffs, one B., and defendant, reciting that B. had been appointed by plaintiffs a clerk in their bank at K. or elsewhere, as might be determined upon, B. covenanting during his service as clerk, *or in any other capacity whatsoever*, to be faithful in his conduct, render proper accounts, obey orders, pay moneys, not embezzle, &c., &c., make good any loss caused by his misbehaviour, &c., &c.; and defendant covenanting that B. should well and truly perform all his covenants; *averment*, that B. entered the bank as a clerk, and while in such employ, &c., (charging certain breaches of covenant by B. in the capacity of teller, misapplication of moneys, &c.)

Plea, that before breach B. was, without defendant's consent, removed by plaintiffs from the situation of clerk to that of teller, which was another and different office, and in which he was entrusted with far larger moneys than in his former position, and his responsibility entirely changed and increased:

Held, on demurrer, bad.

DECLARATION on a deed, executed 14th December, 1866, between plaintiff of the first part, one Isaac Barnes of the second part, and defendant of the third part, reciting that Barnes had been appointed by plaintiffs to be a clerk in their bank at Kingston, or such other station as should be afterwards determined, and at such salary as might from time to time be agreed on; that Barnes covenanted that so long as he should continue in plaintiffs' service in the capacity of clerk, or in any other capacity whatever, he would faithfully conduct himself in such service and employ, render proper accounts, obey orders, pay moneys, not embezzle, &c., &c., and make good any loss sustained by his misbehavior, &c., &c.; and defendant covenanted that Barnes should well and truly perform all his covenants, &c., defendant not to be liable beyond \$4,000; that Barnes entered plaintiffs' bank as a clerk, and while in such employ, &c., (setting out breaches of covenant by Barnes while acting in the capacity of teller in the bank at Kingston, misapplying moneys, &c.)

Plea, except as to a sum paid into court under a preceding plea, that before breach Barnes was (without defendant's consent) removed by plaintiffs from the situation of clerk

in their employ, and appointed to another office and situation, to wit, to the office of teller in the bank at Kingston, which was another and different office, and in which he was entrusted with far larger moneys than in the former employment, and his responsibility entirely changed and greatly increased.

To this plea the plaintiffs filed a demurrer, in support of which *Harrison*, Q. C., appeared, but was stopped by the court, and *Anderson* called upon to sustain the plea. He cited *Anderson v. Thornton*, 3 Q. B. 271; *Oswald v. Berwick*, 5 H. L. Ca. 856; *Pibus v. Gibbs*, 6 E. & B. 902. [*Gwynne*, J., referred to *Bank Upper Canada v. Covert*, 5 O.S. 541.]

Harrison, contra, cited *Anderson v. Thornton*, *supra*; *Sanson v. Bell*, 2 Camp. 39.

HAGARTY, C. J.—The plea demurred to is, we think, no answer.

Mr. Anderson rested his argument mainly on the assumption that we could not assume that the office of teller was in any way analogous to that of clerk, or within the character of the employment contemplated by the contract. On the other hand, it appears to us that we are not to assume anything in favor of the plea, which should have shewn, by averment, that the new office was without the scope of the contract. The words are very wide—"in the capacity of clerk, or in any other capacity whatsoever." Had there been no decisions on this subject, we cannot understand how there could be any doubt as to the true meaning of the contract. We have looked over the authorities and find nothing to support the defendant's argument.

Anderson v. Thornton (3 Q. B. 271) was a case very like the present, and the plaintiff succeeded against the surety; but it was decided rather on a point of special demurrer than on the merits. The law has been discussed in many cases from *Lord Arlington v. Merrick*, in *Wm's Saunders'*, downwards.

Bonar v. Macdonald (3 H. L. 226); *Mayor of Berwick v. Oswald* (5 H. L. Ca. 856); *Mayor of Cambridge v. Dennis* (El. Bl. & El. 660); *Pybus v. Gibb* (6 El. & Bl. 902.)

One of the latest cases is *Skillet v. Fletcher* (L. R. 1 C. P. 223.) Willes, J., says: "It could not be, and was not said, that the mere fact of the principal debtor having additional employment, and receiving a larger amount of money, which would be an increased temptation to dishonesty, relieved the sureties from responsibility." This case is confirmed in error, in L. R. 2 C. P. 469.

I do not feel any difficulty as to the alleged change to the office of "teller in the bank of the plaintiffs at Kingston." The declaration charges that Barnes misconducted himself in the capacity of clerk, while acting as teller in the bank at Kingston, disobeying orders, and cashing a worthless draft, and other matters plainly within the ordinary duties of a clerk of some grade or other in a bank. I do not see how this can be answered by such a plea as that before us. So far as we can see by the record the office of "teller" is either that of a species of the genus "clerk," or is, at all events, one of the capacities contemplated by the contract.

GWYNNE, J.—We are not called upon to decide, as the point was put by Mr. Anderson, whether or not the words of defendant's covenant, "that the said Isaac Barnes should, as long as he should continue in the service of the plaintiffs, in the capacity of clerk, or in any other capacity whatsoever, honestly demean and conduct himself," are sufficiently comprehensive to hold the defendant responsible for the conduct of Barnes in the office of manager, or cashier, or president, if he had been promoted to one of those offices; for, among the matters covenanted by the defendant, I find that he has covenanted that Barnes should willingly obey and execute the lawful commands of the bank, and of the cashier of the bank, and of such other person or persons as might be from time to time set over him by the bank, and the breach is "for an act which,

as the declaration alleges, was committed by him when in the capacity of clerk, namely, "Teller" of the bank at Kingston, in disobedience of the lawful commands of an officer of the bank, called inspector, being a person set over him by the bank.

To this breach the plea professes to set up, as a defence, that the office of "teller" is another and different office from that of "clerk." If by this is meant that it is so *ex vi termini*, then the plea presents no issue in fact to be tried by a jury, and the absence of the defendant's liability appears upon the declaration, for it admits that the breach charged was committed by Barnes, when acting in the capacity of clerk, namely, "teller," at Kingston, and if, *ex vi termini*, a "teller" cannot be a "clerk," then the defendant's defence rests upon a point of law apparent on the record, and there is no occasion for the issue in fact which the plea professes to offer. I am not prepared to declare, as a point of law, that a teller cannot be a clerk: if it be a point of law, I should rather be disposed to say that, *ex vi termini*, he is; but if the plea does not mean that, *ex vi termini*, a teller is a different office from that of "clerk" then the plea is bad, for it does not allege or shew that the employment of Barnes was such as to exclude the application of the defendant's covenant to it and to the breaches of duty alleged to have been committed by him in such employment. The plea, to be good, must afford an answer to every possible state of facts which would support the right of action alleged in the declaration. Now, it is, I think, very plain that the covenant of the defendant is sufficient to cover any employment of Barnes as an officer or servant of the bank, which placed him in subordination to other superior officers or servants of the bank placed over him by the bank. The plea should at least have averred that the office of teller was not such a subordinate employment, and that the duties of that office were not subordinate: then there might have been some place, which there is not now, for Mr. Anderson's argument; but if the duties of teller are of such a subordinate character, then a "teller"

comes within the designation of a "clerk." The plea therefore is, as it appears to me, clearly bad, as not averring matter sufficient to shew that, if true, the act complained of is in law clearly without the scope of the defendant's covenant.

Judgment for plaintiffs on demurrer.

MAGILL v. SAMUEL ET AL.

Insolvency—Demand of assignment—27 & 28 Vic. ch. 17, sec. 3—Pleading.

Declaration, that plaintiff and another carried on business under name of "Magill Bros.," were in good credit, and solvent, and had not ceased to meet their commercial liabilities; that defendants, being creditors for sums exceeding \$500, maliciously intending to injure plaintiff, and destroy his business and credit, falsely, &c., and without reasonable, &c., cause, made a demand in writing on said firm in the form "E" in the schedule to the Insolvent Act of 1864; that within five days thereafter defendants refused to abandon said proceedings, but, as a condition, insisted that plaintiff should retire from said firm, and that certain security for a composition on debts of said firm should be given, or defendants would proceed; that the trade and credit of firm were much injured, and that, in consequence of defendants' proceedings, plaintiff was put out of said firm, without receiving any share of the assets, &c.:

Held, on demurrer, bad, as shewing that the proceedings on the demand terminated against plaintiff instead of in his favor, and as disclosing a state of facts, in the submission of plaintiff to the demand, instead of controverting its reasonableness, which shewed that defendants had reasonable grounds for taking the proceedings complained of.

DECLARATION, that plaintiff and one Edward Magill were carrying on business in partnership, at the City of Hamilton, under the name of Magill & Brothers, and were in good credit and solvent circumstances, and had not committed any act of insolvency, or ceased to meet their commercial liabilities generally, and were not insolvent within the meaning of the Insolvent Act of 1864, as defendants then well knew; yet defendants, being two of the creditors of the said firm of Magill & Brother for sums exceeding in the aggregate \$500, maliciously intending to injure and ruin plaintiff and destroy his business and credit, falsely and maliciously, and without reasonable or

probable cause, and having no reasonable ground for so doing, made a demand in writing on the said firm in the form "E" in the schedule in the said act (setting out the demand); that in five days after making said demand defendants refused to abandon proceedings in insolvency, though requested to do so, but, as a condition, insisted that plaintiff should retire from the firm, &c., and certain security for a composition on debts of said firm of Magill Bros. should be given, or defendants would proceed and subject their estate to compulsory liquidation; that the trade and credit of the firm were much injured, and, in consequence of these proceedings, plaintiff was put out of the firm of Magill Bros. without receiving any share of the assets, &c.; that said Edward Magill and one George Magill became partners in the said business of Magill & Brother, and upon their giving security to the creditors of said firm, defendants abandoned said proceedings; whereby the business was much injured, and plaintiff lost profits and assets, and was injured and ruined, &c.

Plea, in substance, that insolvency proceedings were stayed at request of plaintiff and his partner to enable them to come to terms with their creditors, and that plaintiff afterwards retired from the firm by special agreement with the creditors, on a composition made with them, to which plaintiff became a party.

Plaintiff demurred to this plea, and defendant took several exceptions to the declaration, as disclosing no cause of action, as defendants, in serving the demand, were merely exercising a legal right, and that the damage complained of in consequence would not necessarily or naturally flow from the service of such demand, and the Insolvent Act gave treble costs, as damages, to a debtor, in event of such demand being made without reasonable ground, which would, in contemplation of law, have been full compensation.

Ex Vm +

R. A. Harrison, Q. C., for the plaintiff, cited *Farley v. Danks*, 4 E. & B. 493; *Lunham v. Wakefield*, 16 Ir. C. L.

Reps. 507 ; *Eas. Arch. Co. v. The Queen*, 2 E. & B. 856, 879 ; *Broom's Legal Maxims*, last ed. 641 ; *Hardman v. Bellhouse*, 9 M. & W. 579.

Burton, contra, cited *Norish v. Richards*, 3 A. & E. 733 ; *Crawford v. McLean*, 9 C. P. 215 ; *Steward v. Gromedd*, 7 C. B. N. S. 193 ; *Anon.* 6 Mod. 73 ; *Cottrell v. Jones*, 11 C. B. 713.

GWYNNE, J., delivered the judgment of the court.

The declaration, in my judgment, discloses no cause of action. It was open to the plaintiff to have controverted, before the judge of the Insolvent Court, the right of the defendants to take the proceedings which are complained of. It was competent for the plaintiff to have established, before the proper tribunal, that the demand, set out in the declaration, was, as the plaintiff alleges it was, made without reasonable ground. Instead of taking any steps to controvert the reasonableness of the demand complained of, the plaintiff submitted to it, and, as appears by his declaration, in consequence of it, came to an arrangement for composition with his creditors, including the defendants. In this state of facts, it must, I think, be held to be established that the defendants had reasonable ground for instituting the proceedings, the absence of which reasonable ground is alleged in the declaration, and is essentially necessary to give to the plaintiff any cause of action. The declaration, therefore, on its face displaces the very foundation of the plaintiff's alleged cause of action.

What the plaintiff seems to complain of is, that compulsory liquidation would have necessarily ensued upon the proceedings taken by the defendants, and that he agreed to a compromise with his creditors rather than abide that result ; but an arrangement, for the distribution of the debtor's estate by an assignment, is the remedy provided by the act in substitution for a compulsory liquidation ensuing upon the act of insolvency, which the statute enacts and declares to be the consequence of

the debtor not petitioning against any further proceedings being taken upon the demand, or not making an assignment for the benefit of his creditors in pursuance of the demand. The declaration, then, instead of shewing that proceedings upon the demand have terminated in favor of the plaintiff, in fact shews that they have terminated in favor of the defendants; that the demand has led to the result indicated by the statute; that instead of petitioning against it, as having been made without reasonable ground, it was submitted to by the plaintiff entering into a composition with his creditors. The cases of *Farley v. Danks* (4 El. & Bl. 493) and *Lunham v. Wakefield et al.* (16 Ir. C. L. Rep. 507) seem to be clear authorities that this action will not lie without an averment in the declaration that the proceeding complained of has terminated in favor of the plaintiff. It is not necessary for us to decide whether the action would or not have lain if the plaintiff had presented his petition under the third sub-section of the third section of the Insolvent Act, and had procured all proceedings under the act upon the demand to be set aside. I rest my judgment in this case upon the ground that the plaintiff, instead of averring that proceedings upon the demand had terminated in his favor, shews in his declaration that they have terminated against him, and that the declaration discloses a state of facts which shews that the defendants had reasonable grounds for taking the proceedings complained of, although it avers that they had not. I am of opinion also that the plea is good, although, in my judgment, it was unnecessary, for the declaration itself sufficiently discloses the matter of defence set out in the plea.

Judgment for defendant on demurrer.

MILLER V. BALL.

*Malicious prosecution—Evidence and judge's charge strongly in favor of plaintiff
—Verdict for defendant—New trial refused.*

In an action for having maliciously, and without reasonable or probable cause, had the plaintiff arrested on a criminal charge, though the judge at the trial charged strongly in plaintiff's favor, and the evidence appeared to be strongly in favor of the plaintiff, the court, nevertheless, refused to interfere with the verdict rendered for defendant, and discharged the rule for a new trial, but under the circumstances refused to give the defendant the costs of the application.

This was an action by the plaintiff, a practising attorney, against the defendant, an attorney practising in the same town with himself, for having, without any reasonable or probable cause, maliciously advised and procured one Nesbitt to arrest the plaintiff on a criminal charge of having ten years previously obtained money from him by false pretences, the alleged false pretences relied on being that the plaintiff procured Nesbitt to pay him \$450 on a mortgage assigned to the plaintiff, he alleging that the amount was due to himself, when in fact, as charged, it was not due to him, he having assigned the mortgage, as was said, as appeared by the registry.

The case was tried, at the last Spring Assizes at Woodstock, before the Chief Justice of this court.

The evidence, which was not conflicting, established, upon the testimony of Nesbitt, who was called by the defendant himself, that defendant did give the advice alleged, and that it was upon defendant's advice, given after mature consideration of the facts of the case, that Nesbitt laid the information, which was drawn up by defendant, and procured the arrest of the plaintiff. The evidence shewed that during the ten years which had elapsed since the payment of the money by Nesbitt to the plaintiff, no other person laid any claim to the amount secured by the mortgage; that Nesbitt employed defendant, as his attorney, for the purpose of taking such proceedings as might be necessary to procure the plaintiff to get removed a blot upon the title appearing in the registry,

by the registration of an assignment of the mortgage from the plaintiff to one Holden; that defendant advised Nesbitt that proceedings in Chancery would not be sufficiently effectual, Nesbitt's evidence upon this point being that defendant said "that if I took action in Chancery I would fail; I think your only resource is to lay a criminal information against him; that he would look into it, and I was to call again." When I came, he said he had looked carefully into it, and the case was clear that plaintiff had taken the money wrongfully, and to lay a criminal information against him. I said, then, to do so; if that was the conclusion, to do so;" and thereupon defendant drew the information, and accompanied Nesbitt to the magistrate to get it laid.

The evidence of Holden shewed that this advice was given by the defendant after Holden, upon the application of defendant, upon behalf of Nesbitt, to him, had informed defendant that he claimed no interest in the mortgage, and that he would give a discharge of it. From Holden's evidence it appeared that he was anxious to take advantage of the plaintiff's misfortune in having mislaid the re-assignment of the mortgage from him to plaintiff, and to use that advantage to compel plaintiff to pay him a debt of £12, which plaintiff owed Holden, before he would give a certificate of the money having been paid, for which he had held the mortgage as security. This object he apparently communicated to defendant, who, however, informed Nesbitt, as appeared by the latter's evidence, that Holden claimed £40.

The learned Chief Justice was strongly of opinion against defendant, and he so charged the jury, and he left it to them to say, "whether the advice or counsel so given was or was not given as a *bonâ fide* opinion that a criminal offence had been committed, which was in good faith intended to be prosecuted against the plaintiff, or was it designed as a contrivance, not for such honest object, but for some other object, to force plaintiff into doing what they could not otherwise get him to do."

No objection was made to the charge.

The jury found for the defendant.

Anderson obtained a rule *nisi* for a new trial, on the evidence, and because the verdict was against the judge's charge.

D. B. Read, Q. C., shewed cause, and *Anderson* supported the rule.

GWYNNE, J., delivered the judgment of the court.

In *Belcher v. Prettie* (10 Bing. 414) upon a rule to set aside a verdict for defendant, as against evidence, Tindal, C. J., says: "Where a case involves not matter of law, but that which is purely a question of fact, and that fact has been submitted to those whom the law has constituted *judices facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt whether they have come to a right conclusion. Before we send the party down again we ought to perceive, if not with moral certainty, at least with a degree of clearness approaching to it, that the jury have done wrong."

These observations were made in relation to the particular question in issue in that case, which was, whether a payment made by a bankrupt to the defendant was made by way of fraudulent preference or not; but they may perhaps be held to express a rule as nearly of general application as any rule can be on a motion for a new trial, as against the evidence.

In *Mellin v. Taylor* (3 Bing. N. C. 109), where a new trial was granted in a case of criminal conversation, upon the ground that the verdict, which was rendered for the defendant, was against the weight of the evidence, the same learned judge says: "We agree that in every case, in which the verdict has turned upon a question of fact, which has been submitted to a jury, and there is no objection to the verdict, except that it is found, in the opinion of the court, against the weight of evidence, the court

ought to exercise not merely a cautious, but a strict and sure judgment, before they send the case to a second jury. The general rule under such circumstances is, that the verdict, once found, shall stand. The setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence."

In *Davies v. Roper* (2 Jur. N. S. 169) a third new trial was granted, at the instance of the defendant, upon the ground that the verdict was against the weight of evidence. Chief Justice Jervis, who tried the case, having certified that, in his opinion, the verdict was a very wrong verdict, Martin, B., addressing the counsel, shewing cause to the rule, asks, "Did you ever know an instance of the court having refused a new trial, where the judge, who tried the cause, certified the verdict to be a very wrong one?" to which counsel replied, "Frequently, when the application was for a *second* new trial" (admitting the suggestion to be unanswerable in the case of a *first* new trial being asked); but to this Martin, B., answered, "I never knew such an instance, where the judge took the trouble of writing it down as he has done here;" and, in giving his judgment, he says, "I believe judges are most careful not to interfere with the verdicts of juries; but if a verdict is to stand, when the judge says it is a very wrong verdict, trial by jury will become a great evil."

Bramwell, B., delivering the judgment of the court, in *Allaway v. Bennett* and *Allaway v. Harris* (6 Jur. N. S. 347) confines the application of this rule to cases where the judge's dissatisfaction with the verdict arises upon a question of the credibility of the witnesses, upon a conflict of testimony. He says: "The opinion of a judge, by whom a cause is tried, is always entitled to great respect, and, when expressed on the credibility of the witnesses is all important, for that is a subject on which the court in *banc* cannot so well judge as he. But where there is no conflict of testimony, and the question is as to what is the value of the evidence given on the trial, the opinion of the judge at the trial, beyond the respect always due to

the opinion of any judge, is not entitled to more weight than that of any other person."

In *Browne v. Gordon* (1 C. B. 728), where, in case for libel, a verdict was rendered for the defendant, the court refused to grant a new trial, because they thought that the innuendo was laid with a wider range than the words of the libel might fairly warrant, and therefore the court could not find fault with the conclusion to which the jury had come, in effect declining to attribute to the words the innuendo laid.

Now, there cannot be two opinions that the accusation charged in this case, if unwarranted, was a wrong to the plaintiff. His liberty and his reputation, in both of which he is entitled to the protection of the law, were assailed. The charge involved in the declaration against the defendant was one of mixed law and fact: 1st, of fact, whether the defendant did or not advise and procure the arrest; 2nd, of law, whether he had any reasonable or probable cause for so doing; 3rd, of law, that if he had no reasonable or probable cause, malice might be inferred by the jury; and 4th, of fact, was the defendant actuated by express malice, or not, as appearing from the evidence?

[The learned judge here reviewed the evidence, as given above].

It does certainly appear to be difficult to understand how, under such circumstances, the defendant could have honestly and in good faith entertained the idea that the plaintiff had sixteen years previously obtained payment of the mortgage from Nesbitt by false pretences, or could have conceived himself justified in advising that a criminal information for such an offence should be laid against the plaintiff.

In the view of the evidence taken by the learned Chief Justice I entirely concur, and I confess that I find it difficult to reconcile the verdict of the jury with any reasonable construction of the evidence; at the same time, I have come to the conclusion that, in an action of this nature, it is perhaps more proper, and more in accordance with con-

stitutional principles, that we should yield to the view taken by those who are the appointed judges of fact, although this verdict is irreconcilable with our notions of the proper inferences to have been drawn from the evidence, lest by a contrary decision *we should seem* to exceed *our* jurisdiction.

All questions of fact are within the exclusive province of the jury, but questions of fraud and malice may be said to be more peculiarly so than any other; and the court in those cases does not, I think, where the defendant is acquitted of the fraud or malice, ever exercise the right of sending the case to a second jury in the same manner as in other questions of fact which appear to the court to be found against the evidence, or as in cases where those issues are, in the judgment of the court, found wrongly against the defendant. Chief Justice Tindal, in the case of *Belcher v. Prettie*, already referred to, says: "The question, what is the intention of a man performing a certain act, is to be judged of not by the judges of the land, but a jury. It is a question involving the consideration of fraud, which, *upon all occasions*, has been said to be *solely* and *peculiarly* for the consideration of a jury."

In this case the motive and intention of the defendant, in giving the advice which caused the arrest of the plaintiff, was submitted to the jury with a charge of the learned Chief Justice favorable to the plaintiff. We must take it, then, I think, that the jury has advisedly acquitted the defendant of the malice attributed to him. If, instead of so doing, the jury had rendered a verdict in favor of the plaintiff, with damages however small, we could not, for the smallness of the damages, have set aside the verdict: *Kendall v. Hayward* (5 Bing. N. C. 424). We cannot, I think, properly conclude that, in the presence of the clear charge of the learned Chief Justice, the jury have rendered their verdict under any mistake as to what the issue left to them was. We could not, then, set aside this verdict without imputing to the jury some prejudice or evil motive as influencing them in rendering the verdict which

they have rendered, and upon the whole I think that, in a case where the issue is malice or no malice, the jury having acquitted the defendant, he must retain his verdict, although we may be unable to concur in the justice of it upon the facts as appearing in the evidence.

Rule discharged, without costs.

WALSH V. NATTRASS.

Seduction—Evidence of rape—Duty of Judge in such case—Misdirection—Verdict for plaintiff—New trial refused.

Held, following *Brown v. Dalby*, 7 U. C. 160, that the defendant, in an action of seduction, cannot move against a verdict in favour of the plaintiff, as contrary to law and evidence, on the ground that the evidence of the witness shewed that a rape had been committed upon her. Per *Gwynne, J.*, that it is the duty of the judge to decide whether the case is in a fit position to be tried, and, if the evidence, in law, constitutes felony, it is not in a fit position for trial. In such case, if the plaintiff refuses to be non-suited, the judge should discharge the jury until the criminal offence has been disposed of.

In this case the judge was of opinion that the woman did not intend to impute a criminal charge :

Held, per *Gwynne, J.*, that he would have been right in leaving the case to the jury in the ordinary way, but that he was wrong in accompanying it with the direction to find whether, in *their* opinion, a felony had been committed.

This was an action brought by the plaintiff for the seduction of his daughter.

The case was tried at the last Spring Assizes, at Cobourg, before A. Wilson, J.

It was contended, on behalf of the defendant, that the evidence of the principal witness (the seduced) shewed that a rape had been committed upon her.

The learned judge was himself of opinion that no rape had been committed, but he left it to the jury to find the fact, accompanied with the direction that, if they found in the affirmative, they should render a verdict for the defendant.

The jury found that no rape had been committed, and returned a verdict for the plaintiff.

H. Cameron obtained a rule *nisi* for a new trial, chiefly on the ground that the evidence shewing that a rape had been committed, the judge should have so told the jury, stopped the case, and discharged the jury.

J. D. Armour shewed cause, citing *Brown v. Dalby*, 7 U. C. 160 ; *Hayle v. Hayle*, 3 O. S. 295 ; *Crosby v. Leng*, 12 Ea. 409 ; *Lutterell v. Reynell*, 1 Mod. 283 ; *Stone v. Marsh*, 6 B. & C. 551 ; *Marsh v. Keating*, 1 B. N. C. 198 ; *Wellock v. Constantine*, 7 L. T. N. S. 751, 32 L. J. Ex. 285, 9 Jur. N. S. 232, 2 F. & F. 791 ; *Vincent v. Sprague*, 3 U. C. 283.

GWYNNE, J.—The true principle, as appears to me, which is to be collected from all the cases, is, that in an action of this nature, when the connection, which is the foundation of the action, is supported solely upon the evidence of the girl, and that her evidence shews a state of facts, which, if true, constitutes felony, there is no question to be left, and therefore the case should not be left to the jury, and the duty of the judge, in such case, if the plaintiff refuses to be non-suited, is to stop the case and discharge the jury ; but that if the girl, in her evidence, relates the circumstances so as to impress the judge with the belief that, although she uses the terms *violence and against her will*, the context of her narrative shews that *she* does not intend to convey the felonious charge, then it is proper for the judge to leave it to the jury, not to say whether, in their opinion, the felony has been committed or not, but as a civil action to be tried in the ordinary way, where no charge of felony comes out in the evidence. If the question, whether a felony has been committed or not, involves such a doubt as to require the intervention of a jury to determine it, the judge should, in my opinion, stop the case, in order that the doubt may be solved by the only competent tribunal, a jury sworn to try an issue joined on the criminal charge. The principle, which is the foundation of the rule, is, not that the felony appearing constitutes any defence to the action, but that by a rule of law the civil remedy is suspended, upon a felony appearing, until the defendant

charged with the felony shall have been acquitted or convicted in due course of law, and it is incumbent on the court to interpose, in order that the ends of public justice may be attained : *Hayle v. Hayle* (3 O. S. 296). In *Crosby v. Leng* (12 East. 413) Lord Ellenborough says, "The policy of the law requires that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied." In *Marsh v. Keating*, in the House of Lords, (1 Bing. N. C. p. 217) the rule is thus laid down by all the judges, "The civil remedy is *in all cases* suspended by a felony, where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act;" and in *Wellock v. Constantine*, as reported in 9 Jur. N.S. p. 232, where it was urged that the plaintiff's claim was not presented as on a felony, that the act was not complained of as felonious, Pollock, C. B., answers, "Nothing depends upon the way a cause is opened, it depends upon the pleading *and the evidence*;" and, in giving judgment, he says the ground upon which the nonsuit proceeded was that after it appeared that the civil right, or rather the wrong complained of, and for which a civil remedy was sought by the action, involved a charge of felony, the proper course to take was, not to go on with the enquiry, but to leave the matter to be tried as a criminal offence." This rule applies whether the plaintiff be the person upon whose person the alleged felony was committed, or a person who can sustain his cause of action only in virtue of a wrong done to him through another by an act, which, as between defendant and that other, constitutes felony; for the rule depends not upon any consideration of the case, as presented by the plaintiff, or of the defence set up thereto by the defendant, but upon the exigencies of public policy, which requires that the moment the act relied upon by the plaintiff appears by the evidence to have been felonious, the civil remedy should be suspended until the felony is disposed of in due course of law : *Lutterell v. Reynell* (1 Mod. 283);

Vincent v. Sprague (3 U. C. 283). If the evidence should establish a clear undoubted charge of felony, a judge would not, in my opinion, be justified in directing a verdict to be rendered for the defendant, although the plaintiff should refuse to be nonsuited, because, by such a verdict, the plaintiff would be for ever barred ; whereas the principle which applies is, that the civil remedy shall be only suspended until a conviction or acquittal upon the criminal charge should be obtained. After the close of the criminal prosecution, whether the result should be acquittal or conviction, the plaintiff is entitled to pursue his civil remedy. For the same reason that a judge is not justified in any case, however clear and uncontradicted the evidence of the felony may be, in directing a verdict to be rendered for the defendant, he is not, in my opinion, justified in submitting the case to the jury, with a direction to them, first, to find whether a felony has or has not been proved to their satisfaction, and if it has to render a verdict for the defendant, but otherwise to proceed with the determination of the case ; because, if the jury should, under such direction, render a verdict for the defendant, the plaintiff would be for ever barred equally as in the other case, and the principle of law, that the civil remedy is suspended only until conviction or acquittal, is equally violated. Moreover, no case should be left to a jury unless the judge, who tries it, is satisfied the case is in a position to be tried by them ; but a case cannot be said to be in a position to be so tried, if the jury are to be called upon first to determine whether they are satisfied that a felony has been committed or not. Submitting such a question to a jury is submitting the question, whether the case is in a position to be tried or not, which, as said by Pollock, C. B., in *Wellock v. Constantine*, is not a question which can be submitted to a jury. It is the judge who must alone determine whether the case is in a position for it to be tried, and if the witness, called by the plaintiff to establish the act, which is the foundation of the action, describes it in a manner, which, if true, involves a charge of felony, the

judge's duty, as it appears to me, not in the right of the defendant, or as upon a defence to the action appearing, but in obedience to the demands of public policy, is, to assume, as an undisputed fact, as far as the civil action is concerned, that the felony has been committed, and to suspend the trial either by a nonsuit, or, if the plaintiff will not accept a nonsuit, by discharging the jury. What the policy of the law requires is, that the judge himself should exercise his discretion and intervene, by stopping all further proceedings in pursuit of the civil remedy, the moment that the evidence shews that the act, which is the foundation of the action, does in law, if true, in fact constitute a felony. If there be two acts, the one felonious and the other not, and either one be sufficient to support the action, then, as suggested in *Wellock v. Constantine*, and as occurred in *Hayle v. Hayle*, the action may proceed, notwithstanding the evidence of felony.

In the case before us the learned judge, who tried the case, was of opinion that the witness did not intend to represent the act as a felonious act, but, judging from her whole narrative and surrounding circumstances, that she merely meant to convey that she yielded, not with any active volition on her part, but to a species of semi-coercive persuasion of the defendant. Entertaining this impression, it was, in my opinion, competent and proper to submit the case to the jury in the ordinary way, as in a case where no evidence of a felonious act was given, but unaccompanied with any direction to the jury, first, to enquire whether in their opinion a felony had been committed or not.

Whether the opinion which the learned judge formed of the evidence was correct or not, that is, whether another judge might or not have formed a different opinion from the evidence, is not, I think, a point which we are called upon to decide. The public policy of the law will, I have no doubt, be sufficiently protected by leaving that point to the discretion of the judge who tries the case, and who, from the demeanor of the witness, the general context of her

narrative and the modes of expression made use of by her, can best determine whether or not *she* intends to convey by her evidence a charge of felony.

If a judge improperly withhold a case from a jury, by reason of an erroneous view taken by him of the evidence, no doubt the *plaintiff* has a *right* to have his decision reviewed by the court, although I think in cases of this kind the court should be extremely cautious in interfering with the view entertained by the judge, who heard the evidence given; but, where the judge thinks it proper to submit the case to the jury, I do not think that a *defendant* has a *right* to review his decision as effecting a wrong to him. By submitting the case to the jury the judge has not deprived the defendant of any *defence* to the action. The charge appearing by the evidence to be one of felony does not in law give him *any defence to the action*. It is only the public policy of the law which requires the judge to intervene in the interest of the State, and his not doing so gives to the defendant, in my judgment, no right to move. Upon this principle I think *Brown v. Dalby* (7 U. C. 160) can be sustained, even if it should ever be reviewed in a Court of Appeal. It is a decision governing this case, by which we must be bound, even though we should not be able to agree with it in all its particulars, and may, in my opinion, be supported on the view which I take, that, in the given case, the action of the judge, however mistaken he may be as to what is due to public policy, gives to the defendant no right to complain, or to assert a right to set aside the verdict, as against law and evidence. In *Livingstone v. Massey* (23 U. C. 156) leave was reserved to move to enter a nonsuit and the point was not taken. In the view which I take, therefore, this rule must be discharged.

HAGARTY, C. J.—I am not prepared to assent to some of the views expressed by my brother Gwynne in his carefully prepared judgment.

I decide this case on the law declared in *Brown v. Dalby*

(7 U. C. 160). I think I am bound by it until reversed by a higher court.

I see a very marked distinction between such a case as *Wellock v. Constantine* and this. There a woman sues for damages resulting from an assault, which she declares amounted to a rape. It may be quite sound law that public policy and other considerations require it to be laid down, as matter for the judge to decide, that damages cannot in such case be recovered, just as, in somewhat analogous cases, a man, whose property has been feloniously stolen, cannot sue for their value without first *bonâ fide* setting, or endeavouring to set, the criminal law in motion, to punish the offender.

Here the father stands in a different position. He does not assert or admit that a crime has been committed, and in a case like the present, where all the surrounding circumstances and the contradictory testimony of the witness herself, leave very small reason to believe that any crime has been committed, I think we are bound, according to the case already cited, to hold that the plaintiff was entitled to have the question submitted to the jury.

The learned judge was satisfied that this was no rape. He left it, however, to the jury to find for defendant, if they believed there had been rape. Even if he were wrong in leaving it as a question to them, as they found rightly on the evidence, such direction would not affect the verdict.

On the general merits we do not feel warranted in interfering. Unless the jury had good ground for wholly rejecting the positive testimony offered at the trial, the awarding of a verdict of \$500 damages would indicate an indifference to female looseness and unchastity very much to be regretted.

Rule discharged.

MCGIVERN V. MCCAUSLAND, ET AL.

Execution—Delay—Chattel mortgage—Priority—Trover—Excessive Damages.

On 23rd July, 1868, M. recovered judgment against J. for \$2,023.51, and issued *fi. fa.* against goods, the execution of which was delayed until the end of the following month by an application to amend. On the 3rd of October, 1868, J. gave plaintiff a chattel mortgage, which was registered the 6th of October, payable a year after date. J., with plaintiff's consent, continued his business, and had sold a large part of the chattels, when plaintiff (in January, 1869,) came to take possession. Thereupon the sheriff, whose previous action under the *fi. fa.*, if any, did not appear, but who had no authority for the delay, seized and sold the remaining goods, when plaintiff brought trover against him. plaintiff and defendant in the execution, and another who had joined in indemnifying the sheriff, contending that the delay in executing the *fi. fa.*, gave his chattel mortgage priority. The jury gave a verdict for \$1510, against the sheriff and in favour of all the other defendants. This verdict, being inconsistent with any view of the facts, and exorbitant in amount, was set aside, costs to abide the event.

This was an action for the conversion by the defendants of divers carriages, waggons and other chattels, claimed by the plaintiff to be his property.

The defendants John A. McCausland and John McCausland joined in pleading not guilty. The defendants Colin Munro and Marshall B. McCausland severally pleaded not guilty, and that the goods were not, nor was any of them, the goods of the plaintiff. All the defendants appeared and pleaded by the same attorney.

At the trial the plaintiff claimed title to the goods in question in virtue of a chattel mortgage executed by the defendant John A. McCausland to the plaintiff, dated the third day of October, 1868, and registered, with the necessary affidavits, on the 6th day of October, 1868. By certain admissions, signed on behalf of the plaintiff and defendants respectively, and filed at the trial, it was admitted that the defendants John McCausland and Marshall B. McCausland gave a bond of indemnity to the defendant Munro, as sheriff, to indemnify him in selling the goods under a *fi. fa.*, placed in his hands, as sheriff, to be executed, upon a judgment recovered in the Court of Queen's Bench by the defendant Marshall B. McCausland against the

defendant John A. McCausland; that on the 7th January, 1869, the plaintiff and another creditor served upon the defendant John A. McCausland a notice and demand to make an assignment under sub-section 2 of section 3 of the Insolvent Act of 1864; that in pursuance of such notice and demand, the said John A. McCausland, on the 2nd day of February, 1869, made an assignment under the said Act, and filed the same on that day, with a schedule of liabilities and affidavit of its correctness; that of the goods mentioned in the chattel mortgage, dated 3rd October, 1868, the defendant Munro, as sheriff, sold under the aforesaid execution the following viz.: one democrat waggon, another waggon, one buggy, a quantity of carriage stock and materials, one centre table, one parlour stove, one sorrel mare, one second-hand buggy, and one set of single harness.

What the value of those articles was did not specifically appear, but, from the evidence of value given at the trial, they would seem to have been valued at about \$420, and to have realized about \$320.

At the trial, before Hagarty, C. J., at Hamilton, in March, 1869, a great deal of evidence, not of a very positive character, was adduced by the plaintiff, for the purpose of establishing that goods to a much greater extent than above admitted, and in fact to the extent of the goods seized by the sheriff, were goods which were covered by and included in the chattel mortgage; while, on the contrary, evidence was given, on behalf of the defendants, that the goods so admitted were the only goods seized by the sheriff which were in John A. McCausland's possession at the time of the mortgage, and included therein.

The contention, on the part of the plaintiff, was, that the chattel mortgage passed the property and gave to the plaintiff such a right to immediate possession as to maintain trover, although the time for payment of the amount secured thereby had not arrived. It was sought to be established, on the part of the plaintiff, that the sheriff had made a prior seizure under the same writ, and that he had

abandoned such seizure before the execution of the chattel mortgage, and upon this assumption it was contended that the property passed by the mortgage released from the operation of the writ, and that therefore the seizure and sale, set up by the sheriff, which was in January, 1869, some months after the execution of the mortgage, was a conversion for which this action well lay.

Whether or not there had been a prior seizure did not clearly appear, or, if there had been, what property was seized did not appear, nor whether any of the goods which were the subject of this action had been included in such seizure.

The only evidence to connect John McCausland with the seizure in January was to the effect that, upon the plaintiff then proceeding to take possession of the goods mentioned in the mortgage, for an alleged breach of the conditions thereof, John A. McCausland had requested delay until he should consult with his friends; that thereupon he went away ostensibly for that purpose. In conversation with a professional gentleman, acting as plaintiff's attorney in the matter of the mortgage, John A. McCausland, before he had gone to consult his friends, had stated that he did not consider his brother's, Marshall B. McCausland's, judgment a liability; and after John A. McCausland's return, upon being charged with having gone to fetch the sheriff out, he replied "that the plaintiff must not ride rough-shod over him." Immediately afterwards the sheriff arrived and seized the goods.

It also appeared in evidence that John A. McCausland, when he left for the alleged purpose of consulting his friends, went to Mr. Ellis, a practising attorney in St. Thomas, and who was the attorney of Marshall B. McCausland in the judgment and on the writ of execution. According to Mr. Ellis's evidence, John A. McCausland came to him and consulted him whether the plaintiff could take the goods under the chattel mortgage before the time for payment of the amount secured had arrived. Mr. Ellis thereupon immediately went to the sheriff, and told him

that he would hold him responsible for the goods ; and it was upon this intimation, it was assumed, that the sheriff went out and made the seizure.

From all this, and from the connection which existed between John A. McCausland and Marshall B. McCausland, and from the fact that the writ was in the sheriff's hands for some months before the execution of the chattel mortgage, and from the fact that, in reply to an enquiry, made by the plaintiff's attorney at the time of the seizure, of the sheriff, why he had delayed so long in executing the writ, he stated, as was alleged in evidence, that, "as the plaintiff and defendant were brothers, he did not think it was seriously intended that he should sell, and that he thought that there had been some arrangement between them," the plaintiff contended that it should be inferred not only that the sheriff had been put in motion to seize by the direct contrivance of John A. McCausland, but that the judgment itself and the execution were fraudulent contrivances to protect the property against creditors.

Mr. Ellis gave evidence to the effect that the judgment was *bonâ fide* and justly due ; that part of it was for an amount secured by a mortgage on land, executed by John A. McCausland to John McCausland, which Marshall B. McCausland had purchased, some \$1,200 of the debt being for principal and interest due on the amount in this mortgage, and which land comprised in the mortgage now, as stated by Mr. Ellis, went to John A.'s creditors, and the residue of money due to Marshall B. McCausland, collected and received by John A., to Marshall's use ; that although the judgment had been recovered on a specially endorsed writ, yet it was a hostile proceeding, and that his clerk having made some mistake as to the true amount, he applied to John A. for his consent to an amendment, which he refused to grant, saying that "if his brother was going to tear him to pieces he would not help him ;" that thereupon he (Ellis) had to apply to a Judge in Chambers upon affidavits for, and had obtained, leave to amend, and the *fi. fa.* in the sheriff's hands was accordingly amended some

time in August. He said, in his evidence, "There were no instructions whatever given to the sheriff as to delay in executing the writ; it remained until the end of August before I got the order to amend. In September I applied to the sheriff and asked him why he did not make return, as plaintiff (Marshall) wanted the money. The sheriff promised to go on. He is very dilatory," There was no evidence of the execution creditor or his attorney having authorized the sheriff to delay executing the writ.

On behalf of John A. McCausland it was contended that there was no evidence to connect him with the seizure, so as to make him liable in this action, even though the seizure should prove to be, for any reason, unauthorized as against the plaintiff.

The learned Chief Justice was inclined to think that there was not evidence to charge him, if at least the judgment was *bonâ fide*: however, he left the case as to him, as well as to the others, to the jury, reserving leave to him to move to enter a non-suit. On behalf of John McCausland it was contended, upon the authority of *McLeod v. Fortune*, 19 U. C. 98, that his signing the writ of indemnity to the sheriff did not render him liable, and that as this was the only evidence to connect him with the sheriff's act, he was entitled to a verdict, or that as to him the plaintiff should be non-suited.

On behalf of Marshall B. McCausland it was contended that there was no evidence to avoid his judgment, and that it was in fact a *bonâ fide* judgment; that he had never given or authorized any instructions to be given to the sheriff to delay the execution of the writ; that the delay was wholly the act of the sheriff, for which he was not responsible, and by which he should not be prejudiced.

Upon behalf of the sheriff, as also on behalf of Marshall B. McCausland, it was contended that the seizure and sale by the sheriff were justified under the execution; that from its delivery to the sheriff the goods were bound and were liable to satisfy the execution, notwithstanding the chattel mortgage, and that if the plaintiff had searched the

sheriff's office, when he took the mortgage, he would have found that the goods were bound by the writ. It was further contended that, until default by the mortgagor to pay, the mortgagee had not such a right to immediate possession as enabled him to maintain trover, and that the execution of the chattel mortgage was itself fraudulent and void against creditors, as giving plaintiff a preference over other creditors; that no debt was shewn, nor was any proof given of the consideration, and that the property was insufficiently described; and, finally, it was contended that, inasmuch as it appeared that the plaintiff himself and another creditor had served a demand upon John A. McCausland under sub-section 2 of section 3 of the insolvent Act, in pursuance of which an assignment had been executed by him to an assignee under the Insolvent Act, the plaintiff had no *locus standi* in this action, upon the authority of *Thorne v. Torrance*.

There was some evidence to the effect that at the time of the execution of the chattel mortgage the plaintiff was in insolvent circumstances.

The learned Chief Justice left it to the jury to say whether, at the time of the execution of the chattel mortgage, John A. McCausland was in insolvent circumstances, and whether the mortgage was executed with the intent of giving the plaintiff, as one of his creditors, a preference over his other creditors. 2ndly. Whether Marshall B. McCausland's execution was placed in the sheriff's hands to be executed, or merely to cover the property of John A. McCausland under it.

Leave was reserved to move a non-suit upon the objections taken, according as the finding of the jury upon the above points might or might not give occasion for such motion.

The jury, instead of finding upon the above points in terms, rendered a verdict in favor of the plaintiff against the defendant Munro, the sheriff, and \$1,510 damages, and in favor of all the other defendants.

M. O'Reilly, Q. C., obtained a rule to set aside the verdict and enter a non-suit as to the defendant Colin Munro, or as to all the defendants, pursuant to leave reserved, on the grounds: 1st. The action was misconceived as to the form of it; that the plaintiff not being entitled to the possession of the goods, at the time of commencing the action, the action, if any, should have been for injury to his reversionary interest, and not trover, plaintiff's chattel mortgage not being due. 2nd. That there was no evidence of any conversion. 3rd. That the plaintiff's title, a chattel mortgage, was void, as against the defendant Marshall B. McCausland, the judgment creditor; first, because the goods of the debtor John A. McCausland were bound by the execution in the sheriff's hands, to be executed, at the time of making the chattel mortgage; and secondly, because John A. McCausland, being insolvent, and the chattel mortgage being an act of insolvency, as being an assignment not in conformity with the Insolvent Act, and the plaintiff having served a written demand on John A. McCausland to assign, as an insolvent, in January, 1869, and he having assigned on the 2nd day of February, 1869, in pursuance of such demand, the plaintiff's title became vacated, if not void before. 4th. That the plaintiff's chattel mortgage was void, as against the plaintiff, both by the statute of Elizabeth and the Insolvent Acts, and also under chap. 26 C. S. U. C., and the Chattel Mortgage Act. 5th. For excessive damages. Or for a new trial, on the law and evidence.

R. Martin shewed cause, and *O'Reilly* supported his rule.

GWYNNE, J., delivered the judgment of the court.

In a lengthy argument, addressed to us by counsel for the plaintiff, he laboured to meet the objection which had been made to the right of the plaintiff to sustain an action of trover, by reason of his not having, as was contended, a right to the immediate possession of the goods; but our attention was not drawn to the fact that

the chattel mortgage contains no proviso that the mortgagor may remain in possession until default. In *Corbett v. Sheppard et al.* (4 U. C. C. P. 53), it was held (McLean, J., dissenting) that, in a similar mortgage, the mortgagor, who averred that "he continued in possession, after the mortgage, by and with the consent of the mortgagee, as of his own lawful property," might maintain trover against a judgment creditor of the mortgagor, and the sheriff, who seized and sold the goods comprised in the mortgage, under an execution issued on a judgment, recovered subsequently to the mortgage. The judgment of the majority of the court, however, proceeded upon the averment that the plaintiff's possession was as lawful owner with the consent of the mortgagee. Consistently, then, with this case, and upon the authority of *Watson v. Macquire* (5 C. B. 836) and *White v. Morris* (11 C. B. 1015), there can be no doubt, I think, that the plaintiff may, under the mortgage, maintain trover against a wrong-doer. I do not see the necessity for the objection that the chattel mortgage is void either under the Statute of Elizabeth, the Insolvent Acts, or chapter 26 of the Consolidated Statutes of Upper Canada, or the Chattel Mortgage Act. Notwithstanding these statutes the plaintiff's title under the mortgage is unassailable by strangers and wrong-doers, and the sheriff and the execution creditor are wrong-doers unless they are justified by the judgment and execution, for at the trial no distinction was made between their respective positions: they both rested their defence upon the same grounds. If, indeed, their contention had been that the mortgage was executed pending such a stay of the *feri facias* as had the operation of withdrawing it from the hands of the sheriff for execution, although the judgment was unsatisfied, then, in renewing action under the writ, it would perhaps be necessary to attack the mortgage, as in the case of an execution issued subsequently; but here the contention is that the writ had its operation continually from the time of its delivery to the sheriff, and if that be so, then the plaintiff cannot recover in this action, however free from all taint or statuta-

ble fraud the mortgage may be. The contention, then, of the execution creditor and the sheriff is, that the goods were liable to be seized and sold under the writ from the time of its delivery to the sheriff, and, inasmuch as the writ was in the sheriff's hands when the mortgage was executed, the property in the goods only passed to the plaintiff subject to the operation of the writ: *Samuel v. Duke* (3 M. & W. 622); and that therefore the plaintiff cannot succeed in this action unless he can establish, either that, at the time of the seizure, the writ was not *bonâ fide* in the sheriff's hands to be executed, in which case both the execution creditor and the sheriff would be liable as trespassers, or that the judgment itself is a fraudulent judgment contrived to screen John A. McCausland's goods, or that, after the delivery of the writ to the sheriff, the execution creditor had agreed with his debtor to abandon it, in either of which cases the execution creditor would be liable for setting the sheriff in motion to seize under the writ, although the sheriff himself would not be, unless he had notice of the fraud or of the agreement to abandon, if, at least, he should sever from the execution creditor in his defence.

Now, in this case the defence for the sheriff was rested upon the same grounds as that for the execution creditor. The sheriff depended for his justification upon the rights of the execution creditor, and under these circumstances his case should stand or fall with that of him in whose right he defended. The jury, however, have rendered a verdict in favor of all the defendants except the sheriff. To give effect to this verdict, so rendered in favor of the execution creditor, it must be concluded that the jury were of opinion that the judgment was a *bonâ fide* judgment justly due to the execution creditor, and that he was no party to any proceeding, after the delivery of the writ to the sheriff, amounting to an abandonment of his execution, or any agreement to abandon it on his part, and that therefore he should not be prejudiced by any delay in enforcing it, of which the sheriff alone may have been the cause; and this, as it appears to me, was the proper conclusion to draw from

the evidence. Where a judgment is recovered in the ordinary course of proceeding at law it would be a very serious reflection upon the system of trial by jury if juries should infer fraud in the judgment upon any such evidence as was given in this case. The onus lay upon the plaintiff to attack the judgment, and I think he has failed in doing so successfully. The greater part of the debt recovered by the judgment appears to have been secured by a mortgage executed by the judgment debtor to John McCausland, and purchased by Marshall B. McCausland. The land comprised in the mortgage, as stated in the evidence, accrues now to the benefit of the insolvent estate of the judgment debtor. This mortgage was not assailed by any evidence whatever, and yet this would seem to be the first step necessary in order to assail the judgment as fraudulent. If there be in truth any just reason to suspect fraud in the judgment, the judgment debtor and John McCausland, the mortgagee, are the only persons, probably, who, besides the judgment creditor, could throw any light upon the subject, sufficient to establish the suspected fraud; but the plaintiff did not call them, although he might have examined them as witnesses, and, by making them defendants, he has prevented the judgment creditor from calling them, if it had proved to be necessary for him to do so. That, in such circumstances, fraud should be inferred, because the judgment creditor and judgment debtor are brothers, and because the sheriff has been dilatory in his proceedings, perhaps, for this very reason, would have been in my judgment an unjust conclusion for the jury to have drawn.

Then, as to the suggestion that the writ was not placed in the sheriff's hands *bonâ fide* for execution, the positive evidence of the attorney disproves this charge and seems to establish that all the delay which has occurred in the execution of the writ proceeded from the sheriff alone.

Now, although *Foster v. Glass* (26 U. C. 277) and *Castle v. Ruttan* (4 U. C. C. P. 252) establish that the sheriff may deal with an execution, in his hands to be executed, and with the execution debtor in respect thereof, in such a

manner as to deprive him of the right of setting up such prior writ as a defence to an action against him *for a false return* to a subsequent execution placed in his hands, these cases do not, as it appears to me, govern the present. They proceed, in my judgment, upon this ground, that all the goods of a judgment debtor are liable to be seized under an execution the moment it is placed in the sheriff's hands to be executed, except such goods as are already under seizure and in *custodiâ legis* and liable to the satisfaction of a prior writ; but the dealings of the sheriff in respect of the prior writ may be such as to remove the goods of the debtor *ex custodiâ legis* under it, and to leave them therefore liable to the second writ, and so a return of *nulla bona* to this latter writ would be a false return. Draper, C. J., in his judgment in *Foster v. Glass* (26 U. C. 281), seems to recognize this distinction between an action against the sheriff for a false return, and an action raising an issue between the execution creditor and a person claiming property in the goods, as to the possessory right to the goods. There, speaking of the sheriff's abstaining from executing Mrs. King's writ, the first which was in the sheriff's hands, he says, "As his own (that is, the sheriff's) act it may not affect Mrs. King in any question between her and the present plaintiffs; but it may, and, we think, ought to prevent the sheriff from setting up the first writ, as justifying his returning to the second *nulla bona*, when Marrs (the judgment debtor) certainly had some goods." Now, if the plaintiff here was an execution creditor, claiming that the conduct of the sheriff exposed the goods of the debtor to the plaintiff's writ as goods of the debtor not in *custodiâ legis* under the first writ, those cases would apply; but the position of the plaintiff is very different, in my judgment, from that of an execution creditor at the time the chattel mortgage was executed. *Gates v. Smith* (13 C. P. 572) decides that it is legal for a sheriff, who has withdrawn from possession after seizure under an execution, again to seize the same goods during the currency of the writ. Withdrawal, then, from possession, which however

was not established in this cause, is not a satisfaction of the writ so as to constitute the sheriff the judgment creditor's debtor in lieu of the execution debtor: it operates only to remove the goods from the seizure until another seizure shall be made, so as to let in an intervening execution, which *eo instanti* of its delivery to the sheriff binds the goods not under seizure; but an alienee from the judgment debtor takes only such an interest as the judgment debtor himself has, that is, an interest liable to seizure under such writs as were then in the sheriff's hands. He takes the goods bound by the delivery of the writ to the sheriff, subject to be seized, and not all the goods named in the mortgage, which were not then under seizure. There is, then, a marked difference between two execution creditors, claiming to affect the goods of a judgment debtor, and an execution creditor, whose writ is in the sheriff's hands to be executed, claiming against an alienee; and there is no hardship in recognizing this distinction, for the alienee is a person who takes by contract from the judgment debtor, who can only give what he himself has, and the alienee can by search at the sheriff's office inform himself of the fact of there being a writ in the sheriff's hands which binds the goods, unless that writ be fraudulent; or illusory, or abandoned, in any one of which cases the judgment creditor may be barred as against the alienee; but if it be not fraudulent, or illusory, or abandoned, there can be no pretence for saying that the judgment creditor cannot pursue his remedy against the goods; and if *he* be not barred then *cadit questio* as to the sheriff, who, although, as appears from *Samuel v. Duke* (3 M. & W. 622), may have a defence, although the execution creditor has not, can never be liable if the right of the judgment creditor is unassailable. Now the verdict in this case establishes the position of the judgment creditor to be unassailable, and therefore the verdict against the sheriff cannot be sustained.

In so far as John McCausland is concerned, the case of *McLeod v. Fortune* (19 U. C. 98) is an express authority that he was entitled to a non-suit, although the Court of

Common Pleas, in *Corbett v. Sheppard* (4 C. P. 68), had previously arrived at a different conclusion; but no non-suit is moved upon his behalf separately upon this ground, and so we are not called upon to elect between these conflicting decisions, by which we should abide. As regards Marshall B. McCausland and John A. McCausland, who have had a verdict rendered in their favor, it seems to be hard that their verdict, which is not moved against by the plaintiff, and which we think is justified by the evidence, should be set aside, and that they should be exposed to a second trial, because the jury have erroneously found a verdict against the sheriff, which cannot, as I think, be sustained consistently with the verdict in favor of Marshall B. McCausland, in the assertion of whose rights and in whose interests he acted. The cases, however, of *Davis v. Lennon* (8 U. C. 599); *Doe Dudgeon v. Martin* (13 M. & W. 811); *Belcher v. Magnay* (13 M. & W. 815, note) and the most recent editions of Archbold's Practice, lay it down that, where a verdict is rendered in favor of some and against others of several defendants, a new trial, if granted upon the application of the latter, must, unless by consent, be granted as to all. The defendants also here, in whose favor a verdict has been rendered, concur in the application of the defendant Munro for a new trial generally; the rule, therefore, must be for a new trial generally, and the costs I think should abide the event. At the next trial it will be necessary for the plaintiff to be prepared with more precise evidence than he offered upon the former trial upon the identity of the goods seized with those comprised in the mortgage, for even though he should succeed in establishing a right to recover against any of the defendants, by reason of the judgment being fraudulent and collusive, or by reason of the execution being abandoned by the execution creditor, he can recover only to the extent of the value of such of the goods seized as were in fact comprised in the mortgage. If any of the goods seized were made or acquired by the execution debtor subsequently to the mortgage they did not pass under it, and as

the plaintiff can only recover, if at all, in respect of his paper title, never having been in possession otherwise than under the mortgage, his damages must be limited to such of the goods as he can establish to have been the goods mentioned in this mortgage. As to any other goods, if they have been wrongfully taken, the cause of action in respect of them would belong to the assignee of the insolvent, and, as the goods were not taken from the possession of the plaintiff, the defendants even, though wrong-doers, will be entitled to set up the *jus tertii*: *Leake v. Loveday* (4 M. & G. 972); *Gadsden v. Barrow* (9 Ex. 514). From the evidence as given it seems doubtful whether the plaintiff's right, if any, to a verdict is not limited to those goods seized which are admitted to have been comprised in the mortgage; as to any others, the plaintiff will have to establish clearly his right of property.

Rule absolute for new trial.

CANADA PERMANENT BUILDING AND SAVINGS SOCIETY V. BYERS.

Mortgage—Proviso for tenancy—Construction—Ejectment.

By a mortgage in fee to secure the payment of \$1,490.42c., by monthly instalments of \$12.42c., it was provided that the mortgagor should become tenant to the mortgagees thenceforth, during their will, at the rent of one pepper corn monthly until default, and after default, at the yearly rent of \$149.04c., payable monthly. There was also a proviso that in case of default the mortgagees, without any previous demand of possession, might enter and sell:

An ejectment by the mortgagees, upon default, against a lessee of the mortgagor subsequent to the mortgage,

Held that no notice to quit nor demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy-at-will, and to enable the mortgagees at their option either to distrain or at any time to eject the mortgagor himself without demand; but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession.

If the mortgagor had been simply tenant at will, *Seemle*, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy.

This was an action of ejectment, brought to recover pos-

session of the east half of lot number two, in the fourth concession of the township of St. Vincent.

The plaintiffs claimed under an indenture of mortgage in fee, made on the twenty-eighth day of November, A.D. 1863, by one James Grier, to the plaintiffs. The defendant claimed under an indenture of lease of the same premises, made on the first day of February, A.D. 1868, by the said James Grier, for a term of five years from the date of the indenture of lease.

The indenture of mortgage recited that James Grier, the mortgagor, had become a member of the plaintiffs' society, and had subscribed for eighteen shares, amounting to the sum of \$900, and that he had contracted with the society for the advance of the amount of the shares, which they had agreed to make upon the security of the mortgage, and thereupon the mortgagor conveyed the premises to the defendants in fee, subject to a proviso for making void the same, "if the party of the first part, his heirs, executors, administrators or assigns. do and shall, well and truly pay to the said society, their successors and assigns, the said sum of money, bonus, interest and charges, amounting in all to the sum of one thousand four hundred and ninety dollars and forty-two cents, in equal monthly instalments of twelve dollars and forty-two cents, on the first day of each month, during the term of one hundred and twenty months, until the said sum of money, interest and charges; and also all fines and forfeitures, and also all taxes, rates, assessments, &c., shall be fully paid."

The clause for the mortgagor continuing in possession, was in the special form following: "And the said party of the first part doth hereby agree to become tenant to the said society or their assigns, of the hereditaments and premises hereby bargained, sold, assigned, transferred, conveyed, released and assured, *henceforth* during their will, at the rent of one pepper corn monthly, until default shall be made by the said party of the first part, his heirs, executors, administrators or assigns, in payment of any of the sums payable in respect of the said shares, or in the performance

of any of the covenants herein contained, on the part of the said party of the first part, his heirs, executors, administrators or assigns, to be observed and performed; *and from and immediately after such default* as aforesaid, at the yearly rent of one hundred and forty-nine dollars and four cents of lawful money of Canada, payable monthly, the first payment to be made at the expiration of one month after such default shall be made as aforesaid."

The amount thus reserved as rent was the same identical amount as the monthly instalments of twelve dollars and forty-two cents.

At the trial the defendant insisted that he was entitled to the benefit of this clause, and that its effect was to make him tenant from year to year of the mortgagees, and entitled to notice, or that at least he was tenant-at-will, and as such entitled to a demand of possession.

A verdict was rendered for the defendant, leave being reserved for the plaintiffs to move to set aside that verdict and to enter a verdict for them.

Robinson, Q. C., obtained a rule *nisi* accordingly.

Osler shewed cause, citing *Smith*, L. & T. 23, 24; *Doe Barstow v. Cox*, 11 Q. B. 122; *Doe Dixie v. Davis*, 7 Ex. 89; *Pinhorn v. Souster*, 8 Ex. 763; *Cole on Ejectment*, 58; *Doe Snell v. Tom*, 4 Q. B. 615; *Metropolitan Assurance Society v. Brown*, 4 H. & N. 428; *Keech v. Hall*, 1 Sm. Lea. Cas. 537, 5th ed.

GWYNNE, J., delivered the judgment of the court.

We are not called upon to decide what would be the effect of the above clause in this mortgage, if while the mortgagor was in possession, and no default had been committed, the mortgagees should claim a right to determine the tenancy-at-will and to evict the mortgagor.

We have to deal with the case as after default, and adopting the rule that effect is to be given to the intention of the parties apparent on the instrument there can be no doubt, I think, upon the authority of *Doe Barstow v. Cox* (11 Q. B.

122); *Doe Dixie v. Davis* (7 Ex. 89); *Pinhorn v. Souster* (8 Ex. 763), and other cases collected in *The Royal Canadian Bank v. Kelly* (19 C. P. 196), that had the mortgagor continued in possession after default, he would have been tenant at the will of the plaintiffs at a fixed rent, being the monthly rent of twelve dollars and forty-two cents, in which amount of monthly instalments the mortgage provided that the amount secured thereby was to be paid.

Mr. *Robinson*, Q. C., for the plaintiffs, contended that the plaintiffs were entitled to recover without a demand of possession, insisting that the execution of the indenture of demise by the mortgagor to the defendant was a determination of the tenancy-at-will. This argument seems to be based on the assumption that the tenancy so created between mortgagor and mortgagee would be a tenancy at will pure and simple. In *Birch v. Wright* (1 T. R. 382), it is said by Buller, J., that "if a tenant at will lease, it determines the will," but from *Pinhorn v. Souster* (8 Ex. 772), it appears that it may or may not be so, at the election of the landlord, who, unless notice of the lease be given to him, may distrain. The principle laid down, is, that a tenant at will cannot adversely to his landlord determine his tenancy by transferring his interest to a third party without notice to the landlord; but the landlord, by bringing the action against the lessee of the tenant-at-will, may elect to treat the lease as a determination of the tenancy-at-will.

The defendant does not appear ever to have been accepted by the plaintiff as *their* tenant, so as to entitle *him* to a demand of possession, even if the tenancy created after default between the mortgagor and mortgagees had been a tenancy-at-will pure and simple. But this in my opinion is not so. The tenancy-at-will created by the mortgage is subject to the qualifications of the provisoes and conditions of the mortgage, and among these provisions is the following: "Provided always, and it is hereby agreed, that if default shall happen to be made

in payment of the said several monthly subscriptions, fines and forfeitures, or any of them, or of any part thereof, or of any other payment or sum aforesaid, or any part thereof, at the days and times at which the same are heretofore covenanted to be paid as aforesaid, contrary to the true intention and meaning of the said proviso, of which default the production of this mortgage shall at all times be conclusive evidence, it shall and may be lawful for the said society, their successors or assigns, *without any previous demand of possession*, peaceably and quietly to enter and take possession, &c., and without notice to the party of the first part, and after six months' default in payment of the monthly instalments," absolutely to sell the premises to realize the amount secured by the mortgage in full.

The object of the tenancy clause is for the benefit of the mortgagees, to enable them to distrain for the monthly instalments if the mortgagee should make default in the punctual payment of them, and the combined effect of the two clauses, as it appears to me, is to enable the mortgagees, at their option, to distrain, or at any time to evict the mortgagor without a demand of possession. The defendant here, however, never having been tenant-at-will or otherwise of the mortgagees, and claiming possession of the premises only in virtue of an act which would have entitled the plaintiffs to have regarded the mortgagor's tenancy-at-will determined, if the tenancy created between mortgagor and mortgagees had been a tenancy-at-will pure and simple, can claim as against the plaintiffs no other position than that of a trespasser, and *he* is not entitled to any demand of possession. The verdict for the defendant must therefore be set aside, and the *postea* be given to the plaintiffs.

Rule absolute.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—WILLIAM FRANCIS LEWIS, RENE ED. KIMBER, JOHN MCINTOSH, WILLIAM CHISHOLM, JOSEPH JAMIESON, DAVID SMART, WILLIAM NORRIS, WILLIAM MORTIMER CLARK, JAMES LONSDALE CAPREOL, STEPHEN GIBSON, WILLIAM FRANKLIN METCALF, SETH SOPER SMITH, ED. ELLIOTT, DUNCAN MORRISON, ROBERT HIRK, JAMES RUTLEDGE.

IN THE COURT OF ERROR AND APPEAL.

HOPE V. WHITE (a).

Assignment of rent—Clause of distress—Rent seck or rent charge—Distress in grantee's own name—4 Geo. II. ch. 28.

A landlord, after leasing certain premises, by deed “assigned, transferred, and set over” to M. two instalments of the rent reserved, and appointed him his attorney to sue for, collect or levy by landlord’s warrant, if necessary, in his (the landlord’s) name: *Held*, that the instrument contained a grant, and of a rent charge, as an incorporeal hereditament, accompanied with a clause of distress, and *therefore* not of a rent seck, and that B. could distrain for the rent in his own name; but that, whether rent charge or rent seck, he had equally the power of distress under 4 Geo. II. ch. 28.

This was an appeal from a judgment of the Court of Common Pleas, reported in 18 Common Pleas Reports, 430, where the facts of the case are fully stated.

The following were the grounds of appeal: 1. Rent granted by a lessee for years out of his chattel interest not assignable at common law, so as to give the assignee a right to distrain therefor. 2. No distress for such a rent can be made by the assignee under statute 4 Geo. II., cap. 28, or under any other statute. 3. Defendants have not justified for or in respect of any such rent as the alleged rent seck. 4. If a plea under statute 11, Geo. II., cap. 19, which is only applicable to rent service, it is inapplicable to such a rent. 5. If McLean had the right to distrain in his own name for said rent, as a rent seck, he did not do so. 6. The only distress made was in the name

(a) The case was argued January 8th, 1869, before Draper, C. J., App., Richards, C. J. Q. B., VanKoughnet, C., Hagarty, C. J. C. P., Spragge, V. C., A. Wilson, J., Mowat, V. C., Gwynne, J.

of White, and for the rent service reserved by the lease, which distress was after payment of the rent to White. 7. The jury having found that Hope had no notice of the assignment of rent from White to McLean, and that being a question proper and necessary for the determination of the jury, the decision of the court below, in the face of that finding, ordering a non-suit instead of a new trial, is under any circumstances erroneous. 8. The question whether or not Hope had notice of the assignment of rent, being one for a jury, and having been found against defendants by two juries, the verdict ought not to be disturbed.

R. A. Harrison, Q.C., for the appeal, in addition to the authorities cited in the court below, referred to *Burton* Real Prop., ss. 1102, 1053; ——— v. *Cooper*, 2 Wils. 365; *Bradbury* v. *Wright*, Doug. 627; *Saward* v. *Anstey*, 2 Bing. 519; *Buttery* v. *Robinson*, 3 Bing. 392; *West* v. *Robson*, 3 C. B. N. S. 422; *Webb* v. *Jiggs*, 4 M. & S. 113; *Doods* v. *Thompson*, L. R. 1 C. P. 133; *Dean of Ely* v. *Bliss* 2 D. M. & G. 472, per Lord St. Leonards; *Staniford* v. *Sinclair*, 2 Bing. 193; C. S. U. C. ch. 78, sec. 3; 27 Hen. VIII. ch. 10, s. 1; 32 Hen. VIII. ch. 37; *Hayden* v. *Twerton*, 4 C. B. 1; *Paget* v. *Foley*, 2 B. N. C. 679, 688; *Crosbie* v. *Sugrue*, 9 Ir. L. R. 17; *In re Turner*, 11 Ir. Ch. Rs. 304; *Doe Edney* v. *Benham*, 7 Q. B. 976; *Doe Angell* v. *Angell*, 9 Q. B. 328, 355; *Johnson* v. *Faulkner*, 2 Q. B. 925, 935; *Pluck* v. *Digges*, 5 Bligh, 31; *Reid* v. *Gore District Mutual Insurance Company*, 11 U. C. 345; *Ireson* v. *Mason*, 13 C. P. 323.

McMichael, contra, cited *Co. Litt.* s. 225.

DRAPER, C. J., in Appeal (June 28th, 1869), delivered the judgment of the court.

[After stating the facts of the case his Lordship proceeded]:—Mr. Justice Adam Wilson has laid before us the following statement: “When this case was argued in the court below, it was argued by both parties, according to

the terms of the rule, as if the court had the power to direct a non-suit to be entered on the whole case, and the court unquestionably received the argument in this manner, and decided the case upon the same understanding. It was most distinctly stated by both parties that this rule raised distinctly the question for adjudication, whether a rent seek for years, or dependent on a term for years, was assignable, so as to give the assignee of the rent a right of distress for it in his own name. No other point was argued or determined by the court, and it is not likely this would have been done for the mere gratification of parties, when the case was nevertheless to go again to the prejudices of a jury on the mere question of notice having or not having been given of the assignment of rent to the tenant before the distress was levied.

When the leave to appeal was asked for, though I do not say it was necessary to ask it, the plaintiff's counsel asked it on no such ground as that the court had no power to enter a non-suit, by reason of the issue in evidence on the notice not having been proved by the defendants, but it was to settle the main and only question argued, before stated.

After this course of proceeding by both counsel, and the course which the court below have been induced to take in consequence of it, it would be a waste of time and a farce on the administration of justice to undo all that has been done for the purposes contended for by the plaintiff's counsel.

I think, also, the defendant's counsel is still entitled in strictness to raise the variance between the proof and the pleadings, and to contend that the rent was not payable to White, as alleged, but to McLean, and no amendment has yet been made on the record. If the plaintiff's could raise one strict point in his favor the defendant's can raise another, and so defeat him on that narrow ground.

If the Court of Appeal determine the principal subject of controversy, that decision should be final, whichever way it may be settled."

This explanatory statement was elicited by myself and other members of this court, in consequence of what was submitted by the plaintiff's counsel, during the argument, in relation to the finding of the jury on the question of notice, their verdict negating the assertion, on the part of the defendant, that notice of the assignment to McLean had been given to the plaintiff before the rent in question was paid to White. A former verdict had been set aside by the court, in this cause, because of a similar finding, which was against the evidence then, and, if it were necessary to determine it, would most probably be held against evidence now; and when the plaintiff's counsel referred to this last finding, as putting it out of the power of the court, my brother A. Wilson made some remarks to the effect, that the manner in which the leave to move to enter a non-suit was reserved excluded the discussion of that point. The foregoing statement explains why.

If it be open, notwithstanding this, to the plaintiff to insist that he could not be non-suited, because he had no notice of the assignment, that fact being established by the finding, it appears to me that it would be proper under the 11th section of the Error and Appeal Act, not simply to allow the appeal, discharging the rule which the court below has made absolute, but to do what that court could, and in my humble judgment ought to have done under such circumstances, granted a new trial, with costs to abide the event. The clear evidence there is of the plaintiff's receipt of notice, and the settlement, by giving notes to White for the rent assigned, afford pregnant evidence of the collusion between them to deprive McLean of the rent in question, and makes it the duty of the court to go the utmost length to defeat such an attempt to do a wrong.

I think, however, we are in a position to dispose of the case on the points discussed before us.

The first point to be considered is the effect of the agreement of 13th April, 1863, by which White "assigned, transferred and set over" to McLean "the instalment of rent" for the six months preceding 1st October, 1864, and

the instalment of rent for the six months preceding 1st. October, 1865. This agreement further contains a covenant for the right to assign, and an appointment of McLean as White's attorney, irrevocable, to sue, collect or levy by landlord's warrant, if necessary, *in the name of White*.

The defendants' contention has been that this deed assigns to McLean two payments of rent *quod* rent; that it was rent seck, but was nevertheless distrainable under 4 Geo. II.; that such a rent might be assigned or granted out of a term as well as out of a freehold estate; that this rent being thus vested in McLean, and the plaintiff having notice of the assignment, the payment stated in the declaration to White was no bar to McLean, and that the declaration improperly stated the rent to be payable to White, and that McLean could lawfully distrain for it under the statute 4 Geo. II.

A rent seck is said, in *Bacon's Abridgment*, title "Rent" (A). 3, to be so called because it is unprofitable to the grantor, as before seisin had he can have no recovery of it; as where a man, seised in fee, grants a rent in fee for life, remainder in fee, reserving rent, without any clause of distress, these are rent seck, for which, by the policy of the ancient law, there was no remedy, as there was no tenure between the grantor and grantee, feoffor and feoffee, and consequently no fealty could be due.

White was the landlord seised in fee, and granted a lease to the plaintiff, having the reversion and reserving rent. This was rent service.

Does this agreement transfer his claim as landlord for the two instalments of rent to McLean, granting this as rent issuing to McLean out of the land by force of the deed, with all legal incidents, whatever they may be; or is it any thing more than an authority for the two specified sums, as money due to White, and to be collected or distrained for, if necessary, in his name.

I inclined for some time rather strongly to the latter view; among other reasons, because otherwise the authority granted to sue for, collect and distrain, in the name

of White, would become altogether superfluous and useless *quoad* the right to use the name of White, and every word in a deed should, if possible, have effect given to it.

But, on further consideration, I have adopted the first, as being the true construction of this instrument. I think it is a grant, though that word has not been made use of, but instead thereof the words assign, transfer and set over.

It cannot be necessary to cite authorities to establish such trite propositions as, that the construction should be according to the intent of the parties; that the deed should be taken most strongly against the grantor, most beneficially for the grantee; that the court should mould the words to give effect to the intent of the parties; that words in the deed which are repugnant to the intent may be rejected; that the law looks upon the general or principal intent of the grantor, although there may be a variance in circumstances, or in the secondary or consequential intent.

Now, I think it will not be denied that it is a more beneficial construction for McLean to hold, that this rent was granted to him as an incorporeal hereditament, than to hold that nothing passed to him but the right to demand and receive two several sums of \$100, at certain days when they became due to White, with a power to enforce payment in White's name. In the former case it would vest an interest in McLean in the rent itself, as issuing out of the land, and after notice which, as the case is placed before us, I treat as proved, and which would make the plaintiff, as the tenant, liable to McLean, though his right to demand it was *in futuro*, and no matter into whose hands the reversion might come, this right would not be lessened; whereas, as a mere assignment of a debt, a *chose in action*, McLean would have no legal remedy in his own name, and, if White had died before the "instalments" of rent or either of them became due, he might have some difficulty in enforcing his claim at all.

Assuming, then, the true construction of this agreement to be a grant of two separate half-yearly payments of the rent reserved to White, made by White to McLean, it is

sufficiently clear from the clause, intended to give the power to distrain, that the parties did not mean it should be a rent seck, for the books describe that as, "where one, who is seised in fee, grants a rent in fee for life or for years; or where he makes a feoffment in fee or for life, remainder in fee, reserving rent, but in either case without any clause of distress, here no distress is incident, the reason given being that there is no tenure between the grantor and grantee, wherefore no fealty is due, that being inseparable from the reversion: (*Litt.*, secs. 217, 218, 225, 226; *Co. Litt.* 1476, 93 a).

The different writers, which I have looked at, all concur in pointing out that the distinguishing feature of rent seck is, "where no distress is incident to it" (*Com. Dig. Rent*, C. 9); "a rent, for the recovery of which no power of distress is given either by the rules of the common law or the agreement of the parties" (3 *Cruise*, *Dig. Rents*, ch. 1. sec. 11); "in effect nothing more than a rent reserved (or granted) by deed or will, but without any clause of distress," *Wharton Law Dict. sub voc.*); it was "rent reserved by deed without any clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land."

None of these definitions meet the precise facts of this case, because in fact there is a clause of distress, but framed in a manner inconsistent with what I have suggested to be the true construction of the former part of the deed; for the clause is, to "levy by landlord's warrant, if necessary," in the name of White." The authority to levy by landlord's warrant is a sufficient clause of distress, and, stopping there, is consistent with the grant of the rent to McLean, and, treating the words "if necessary, in the name of," &c., and introduced *ex abundanti*, in case McLean could not distrain in his own name, they may be passed over as not affecting the construction.

The deed, then, in effect would be a grant by White of two separate rents or rent charges of \$100 each, payable to McLean, issuing out of White's estate and interest in the

lands leased to the plaintiff, with a clause of distress in McLean's favor, if the reading of the clause which I have pointed out be adopted, but inoperative, if it must be treated as a power to distrain in the name of White.

If this be the proper construction of the deed as to the grant, the doubt about the clause of distress is really unimportant, since it appears to me to be the result of all the cases, in which the statute 4 Geo. II. has been considered, that it has verbally abolished all distinction between the several kinds of rent, so far as to give the same remedy in cases of rent seck, rents of assize, and chief rents, as in the case of rent reserved upon a lease.

If this is a rent charge, accompanied by a clause of distress, or a rent seck, to which the statute attaches the power to distrain, in either case the plaintiff fails. I adopt the former alternative as the solution of the case, and am of opinion the appeal should be dismissed with costs.

Per Curiam—Appeal dismissed with costs.

DIGEST

OF

CASES REPORTED IN VOL. XIX., MICHAELMAS TERM,
32 VIC., TO EASTER TERM, 32 VIC.

ACCIDENT.

See RAILWAYS AND RAILWAY
Cos.

ACCORD AND SATISFACTION.

After Action.]—*See* PLEADING, 5.

Entered into with wife.]—*See*
PLEADING, 7.

ACCOUNT STATED.

See ESTOPPEL.

ACTION.

*By husband and wife on note made
to wife before marriage.*]—*See*
PLEADING, 7.

ADMINISTRATION.

Breach of condition in bond.]—*See*
PLEADING, 9.

ADMINISTRATOR DURANTI MINORI ÆTATE.

*In action by, widow of deceased
competent witness.*]—*See* WITNESSES
AND EVIDENCE.

AFFIDAVITS.

By jurors.]—*See* VERDICT BY
MISTAKE.

*Sufficiency of, in case of chattel
mortgage.*]—*See* PRIORITY.

AGREEMENT.

To accept deed in satisfaction.]—
See PLEADING, 7.

To divide land.]—*See* INDEBITATUS
ASSUMPSIT.

AMALGAMATION.

See RAILWAYS AND RAILWAY
Cos.

AMENDMENT.

*Power of judge to amend indictment
at trial.*]—*See* CRIMINAL LAW.

APPEAL.

*County Court appeal—Verdict by
consent subject to opinion of court.*

*After the evidence had been taken
in a cause in the county court a
verdict was entered by consent for*

plaintiff, subject to the opinion of the court upon the whole case, with power to the court to reduce the verdict, &c.

Held, that there was no right of appeal to a superior court from the decision of the judge, as not being a case within C. S. U. C. ch. 15, s. 67.—*McColl v. Waddell*, 213.

ARBITRATION.

Under Common School Acts.]—*See* COMMON SCHOOLS.

ARREST.

By Coroner.]—*See* CORONER.

Action against Justice of Peace for.]—*See* NOTICE OF ACTION.

ASSAULT.

Power of Quarter Sessions, in case of, to impose fine and costs of prosecution, and imprisonment in default of payment.]—*See* QUARTER SESSIONS.

ASSIGNEE.

His right to recover back money received by creditor from insolvent in ignorance of insolvency.]—*See* INSOLVENCY, 2.

ASSIGNMENT.

Of policy of insurance by insolvent.]—*See* INSOLVENCY, 1.

Of rent.]—*See* RENT CHARGE.

AVOIDANCE.

Of lease by infant during minority.]—*See* EJECTMENT, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Notes held as collateral security*

for immatured liability on payee's account—Right of holder to sue on notes at maturity—His right, as agent, to sue in his own name—Equitable pleading.

Held, on demurrer to the equitable plea set out below, that, apart from the objection as to a perpetual injunction, not being obtainable, the holder of promissory notes, transferred by the payee, as collateral security against a future liability, on the holder's part, for the payee, can collect the notes at maturity before that liability arises, and that the payee has no control over them so as to enlarge or vary the maker's liability to pay them.

Held, also, that the plaintiff, who held the notes, endorsed to him in blank, as his father's agent, could, as such agent, sue upon them in his own name.

Remarks upon the inadvisability of trying an issue in fact first, where there is also a demurrer on the record.—*Ross v. Tyson*, 294.

2. Indorser — Non-liability — Pleading.

Defendant having endorsed a note for \$1,230, for the purpose of enabling the maker to obtain, as an additional advance, the difference between that sum and the original loan of \$918, advanced to him before the making of the note, which additional advance was, however, not made, *Held*, that defendant was not liable, as endorser, for the \$918 originally loaned, and that a plea setting up the above facts was good.—*Greenwood v. Perry*, 403.

See PLEADING, 3, 6, 7.

BILL STAMPS.

See PLEADING, 3.

BOND.

Payable at particular place and on surrender.

See PLEADING, 2.

“ VARIANCE.



BY-LAW.

Appointment of corporation officer without.]—See CORPORATION.



CANCELLATION.

Of policy before loss.]—See EQUITABLE PLEADINGS, 1.



CHATTEL MORTGAGE.

Sufficiency of affidavit.]—See PRIORITY.

Accepted by agent without assent of principal.]—Ib.

Priority of execution over.]—See NEW TRIAL.



COLLATERAL SECURITY.

Right of holder of promissory notes held as, to collect at maturity, before event of liability for which held as security.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.



COMMISSION TO EXAMINE WITNESSES.

Commissioner sworn before ordinary commissioner—Admissibility—Statutes of limitation—Possession of part of land by caretaker.

A commission for the examination of witnesses, and directed to two persons named, provided as follows, “and we give to each of you full power and authority to administer such oath or affirmation to the other.” The sole acting commissioner, instead of being sworn

before his fellow commissioner, was sworn before an ordinary commissioner of the court :

Held, that the commission was admissible in evidence.

The plaintiff, by his counsel, attended before the commissioner sworn in this way, and took part in the examination of the witness produced, without further objection than refusing to consent to the mode of administering the oath :

Quære, whether he could afterwards impeach the validity of the commission.

The possession for twenty years of part of a lot of land by a caretaker, expressly employed to protect the whole, on behalf of one claiming such whole, and which is accordingly so protected from all other intruders, may be a sufficient possession of that whole to establish a title under the Statutes of Limitations, and such possession will not be confined to the part actually enclosed and occupied.—*Heyland v. Scott*, 165.



COMMON SCHOOLS.

Arbitration—Contract with teacher not under seal—C. S. U. C. ch. 64, 23 Vic. ch. 49, sec. 12—Pleading.

Held, on demurrer to the avowry and cognizance set out below, that there is no right to arbitrate under the Common School Acts (C. S. U. C. ch. 64), unless the contract of service is entered into by the trustees with the employee in their corporate capacity, and evidenced by their corporate seal; and unless the contract has been so entered into, the person discharging the duties of teacher has no legal status as such.—*Birmingham v. Hungerford et al.* 411.

CONSENT.

Verdict by, in County Court Case.]—See APPEAL.

CONTRACT.

With Common School teacher not under seal—effect of.]—See COMMON SCHOOLS.

See WRITTEN CONTRACT, 1, 2.

CONVERSION.

See TRESPASS TO LAND.

CORONER.

Arrest by—Trespass—Mala fides and want of reasonable and probable cause—Nonsuit—New trial.

Plaintiff sued defendant in trespass, stating that, acting as coroner, he assaulted plaintiff, &c. The 2nd count stated that defendant was acting as coroner, &c., and that, a jury being duly sworn, he held an inquisition on the body of one N. F., then lying dead, setting forth the finding of the jury, which shewed that deceased had died from the effects of laudanum administered according to a prescription by plaintiff, and through culpable negligence on his part in not having given sufficiently explicit directions, and charging that defendant maliciously and without reasonable cause issued his warrant for plaintiff's arrest and committal for wilful murder, on which plaintiff was arrested, &c.

At the trial, on its being objected that defendant, as coroner, was Judge of a Court of Record, and that no action would, therefore, lie against him for anything done in his judicial capacity, plaintiff proposed to shew that he had acted

maliciously and was therefore not protected, but without suggesting in what particular he had so acted. It was not disputed, however, that defendant had acted within his jurisdiction and *super visum corporis*, or that he had issued his warrant on the finding of the jury. On this plaintiff was non-suited :

Held, that as defendant was acting judicially, trespass would not lie against him ; and that, though the non-suit did not appear so erroneous as to warrant its being set aside, still, that if plaintiff desired to present facts to the jury not suggested to them at the trial, the court would allow him to do so, on payment of costs.—*Garner v. Coleman, 106.*

CORPORATION.

Master and servant—Appointment at annual salary—Dismissal during year—By-law—29 & 20 Vic. ch. 51, sec. 177.

The property of the Grand River Navigation Co. having passed into the hands of defendants, a municipal corporation, plaintiff was appointed manager thereof by an instrument under their common seal, at an annual salary, from 1st January, 1866, an appointment to which he had been previously recommended in a report of a committee of council, and by a resolution of the same body the mayor was authorized to execute the necessary bonds between plaintiff and defendant.

Held, a valid appointment, and not necessary to have been made by by-law.

Defendants having dismissed plaintiff in September, 1867, *Held* that such dismissal, *before the end of the year*, was wrongful, defen-

dants having recognized plaintiff as their officer after and during the second year; and, until removed, he was to be considered as in office under his original appointment under the corporate seal, and that he was entitled to compensation in like manner as if employed by an individual.

Held, also, that plaintiff was an officer of the corporation under the Municipal Act.—*Broughton v. The Corporation of Brantford*, 434.

COSTS.

Power of Q. S., in case of assault, to impose costs of prosecution.—See QUARTER SESSIONS.

See GARNISHMENT.

COUNTY COURT.

See APPEAL.

COVENANT.

To indemnify sheriff against seizure, revocation of.—See EQUITABLE PLEADINGS, 2.

For quiet enjoyment.—See PLEADING, 4.

COVENANT RUNNING WITH LAND.

Sale of lands—Equity of redemption—Covenant against incumbrances—Substantial damages—Measure of damage.

A covenant against incumbrances in a deed of bargain and sale, purporting to convey the legal fee simple, runs with the land, although the grantor was in fact seised only of an equity of redemption, and can be sued upon as such by the grantee, who will be entitled to substantial, and not merely nomi-

nal, damages; and the measure of damage will be the difference between the value of the equity of redemption and the indefeasible estate of inheritance contracted and paid for, that difference being represented by the amount for which the mortgage stands as a security.—*The Empire Gold Mining Company v. Jones*, 245.

COVENANT TO PAY.

Mortgage—Absence of covenant to pay—Pleading.

Held, on demurrer to the plea set out below, that the mere words, contained in the proviso to a mortgage, "in three equal payments to be respectively made," were not sufficient to create a covenant to pay the amounts specified.—*Jackson v. Yeomans*, 394.

CRIMINAL LAW.

Indictment—Ownership of chattels—Amendment—Evidence of representative character.

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead, and the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection that the property in the cattle was wrongly laid, the indictment was amended, by stating the goods to be the property of the mother. The case proceeded, and no further evidence of the administrative character of the mother was given, the county court judge holding the evidence of R. M. sufficient,

and not leaving any question as to the property to the jury :

On a case reserved, *Held*,

1st. That there was ample evidence of possession in R. M. to support the indictment without amendment.

2nd. That the Judge had power to amend under Con. St. C. ch. 99, s. 78.

3rd. That the conviction on the amended indictment could not be sustained, as the Judge had apparently treated the case as established by the fact of the cattle being the mother's property in her representative character, of which there was no evidence ; nor was any question of ownership by her, apart from her representative character, left to the jury.—*The Queen v. Jackson*, 280.

DAMAGES.

Substantial.] — See COVENANT RUNNING WITH LAND.

DEBT.

Due to wife in representative character.]—See PLEADING, 7.

DELAY.

In execution of fi. fa.]—See NEW TRIAL.

DEMAND OF POSSESSION.

See MORTGAGOR AND MORTGAGEE, 3.

DEPOSIT.

Right to recover back.] — See WRITTEN CONTRACT, 2.

DEPOSITIONS.

Taken in foreign country after

arrest in Canada, admissible here as evidence of criminality in extradition cases.]—See EXTRADITION.

DISMISSAL.

During year, of corporation officer appointed at annual salary.]—See CORPORATION.

DISPUTED SURVEYS.

Nuisance—C. S. U. C. ch. 93, sec. 6—*Sufficiency of petition under.*

On an indictment for nuisance in obstructing a highway, the Crown put in the application by way of petition, under C. S. U. C. ch. 93, sec. 6, in the County Council of the County of Kent, in these words : “ We, the undersigned freeholders of the fourth ward of, &c., humbly shew : That your humble petitioners are labouring under a most weighty grievance in consequence of a dispute having arisen out of the different surveys of the, &c., and as it would appear that no final adjustment can be brought about other than is provided by the 31st clause of the 12 Vic. ch. 35, your petitioners humbly pray that the County Council of, &c., will give this our prayer due consideration, and by acting upon the above named clause of the 12 Vic. ch. 35, you will further and preserve the best interests of your petitioners : as the matter now stands it is impracticable for us to expend our public money or perform our statute labour, having no guarantee that the same will prove to be properly applied.” There was also produced a memorial by the County Council of Kent, to the Governor General, under the same Act, stating that over two-thirds of the freeholders of, &c., had petitioned

the council for a survey to be made of the line in dispute, in order to clear up a doubt that existed as to the site of the concession in question, owing to the dispute that had arisen out of the different surveys, and referring his Excellency to a copy of the petition, by which it would be seen that the petitioners bound themselves to be governed by the conditions of 12 Vic. ch. 35, sec. 31 (C. S. U. C. ch. 93, sec. 6), and praying that the said line might be surveyed. It was proved and not disputed that the necessary number of resident landholders under the Act had applied for the survey, but it was objected that the petition did not shew this.

Held, following *Cooper v. Wellbanks*, 14 C. P. 364, that everything was to be presumed to be done correctly until the contrary was proved, and here it had been proved that the necessary number of persons under the Act had applied for the survey.

Held, also, as to the other objections, viz., that the petition did not shew any want or obliteration of the original survey, and that neither petition nor memorial prayed for placing monuments, that the two documents could not be read in any other sense than as containing an application to the Governor requesting the making of a survey under the Act, and if to be made under the Act, then that the marking by permanent stone boundaries under the direction of the Commissioner of Crown Lands, in the manner prescribed by the Act, was an incident to the survey necessarily involved in the application for the survey; and therefore *Held*, that the petition was sufficient.—*Regina v. McGregor*, 69.

DISTRESS.

Effect of clause of, in mortgage.]
— See MORTGAGOR AND MORTGAGEE, 1.

For interest reserved by mortgage.]
— See MORTGAGOR AND MORTGAGEE, 2.

Of goods of third parties on mortgaged premises.]—lb.

Clause of, in assignment by deed of rent.]—See RENT CHARGE.

In grantee's own name under assignment of rent.]—See RENT CHARGE.

DIVISIBLE VERDICT.

In ejectment.]—See EJECTMENT.

DIVISION COURT.

Unsettled account over \$200—Prohibition.

In a suit in the Division Court the plaintiff claimed \$94.88, annexing to his summons particulars of claim, shewing an account for goods for \$384.23, on which he gave certain credits, which reduced the amount to the sum sued for; but nothing had been done by the parties to liquidate the account, or ascertain what the balance really due was, with the exception of a small amount admitted to have been paid, and a credit of \$33, given for some returned barrels, but which still left an unsettled balance of upwards of \$300:

Held, that the claim was not within the jurisdiction of the Division Court, and a prohibition was therefore ordered.—*In re the Judge of the County Court of the united counties of Northumberland and Durham*, 299.

DOWER.

See PLEADING, 4.

DOWRESS.

Payment of claim of, before judgment or eviction.]—See PLEADING, 4.

EJECTMENT.

1. *Proof of title by plaintiff—Tenancy from year to year under—Notice of intention to use probate of will good for any trial—Divisible verdict.*

Defendant, having put plaintiff to proof of title, and taken exceptions thereto, cannot then set up a tenancy under him from year to year.

A notice of intention to give a probate in evidence as proof of the will is available at any trial of the cause, and not merely at the first trial after the giving of the notice.

Where several plaintiffs claim jointly, but title is not proved in all of them, there will be a verdict for those plaintiffs who prove title, and for the defendant against the others. *Wilson v. Baird*, 97.

2. *Proof of tenancy for years under plaintiff—Lease by infant—Avoidance during minority—Notice of title.*

Defendant, not admitting plaintiff's title, but allowing him to prove it at the trial, without, however, cross-examining his witnesses, or otherwise taking objection to the title as proved, is at liberty to shew title under the plaintiff as a tenant for years.

The doctrine established by *Pettigrew v. Doyle*, 17 C. P. 34, 459, as to the proper notice of title, when plaintiff claims by reason of forfeiture of a term, applies also to a plaintiff claiming to avoid his lease on the ground of infancy.

Semble.—An infant cannot, during his minority, avoid, on the ground of infancy, a lease which is for his benefit.—*Hartshorn v. Earley*, 139.

3. *Railway Company Consol. Act—Mortgage of lands by railway—Ultra vires—Ejectment for railway track.*

A railway company mortgaged land to secure purchase money, subsequently laid down rails upon the mortgaged land and worked the railway:

Held, that the mortgagees were entitled to maintain ejectment, and that such mortgage was not *ultra vires*; that the public rights cannot stand in the way of mortgagees claiming by ejectment; but that, where land is taken under the compulsory clauses, the compensation must be worked out in the manner prescribed by the Statute. *Galt et al v. Erie and Niagara Railway Co. and the Great Western Railway Co.*, 357.

Of mortgagor's tenant by mortgagee]—See MORTGAGOR AND MORTGAGEE, 3.

EQUITABLE PLEADINGS.

1. *Fire insurance—Cancellation of policy after assignment.*

Declaration on a fire policy, averring an assignment of the policy, with the assent of the defendants, to A. B., and that the action was brought as well on behalf of A. B. as on plaintiff's behalf. *Plea*, on equitable grounds, that A. B. was never interested in the insured property, and that before the loss the policy was cancelled by an arrangement between plaintiffs and defendants, by which a policy on other goods was sub-

stituted and the unearned part of the premium credited by defendants to plaintiffs on account of the new policy:

Held, on demurrer, a good answer in Equity, and *Semble*, also, a good legal defence.—*Miall & Co. v. The Western Insurance Co.*, 270.

2. *Sheriff*—Covenant to indemnify against seizure—Revocation of covenant with sheriff's assent—Pleading.

A sheriff, having two executions against the same party in his hands, accepted a covenant from defendants, one of the execution creditors, indemnifying him against any seizure and sale by him. Before anything was done on either writ defendants countermanded and revoked their covenant, with the assent of the sheriff, who afterwards however, went on, sold, and was damnified. To an action brought by him against defendants on their covenant, defendants pleaded the facts by way of equitable defence, and the court held the defence good, considering that the agreement to indemnify merely created a conditional liability, from which they were at liberty to withdraw before any act done or damage sustained, especially where the withdrawal was with the sheriff's assent.

Quære, per Hagarty, C. J., whether the defence, if good in substance, was not equally good at law and in equity. Per Gwynne, J., that the plea would have been good without averment of the sheriff's assent.—*Grange v. Mills et al.*, 398.

EQUITABLE PLEADINGS.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

EQUITY OF REDEMPTION.

Although grantor in deed of bargain and sale, purporting to convey legal fee simple, seised only of, covenant against incumbrances in such deed runs with land, &c.]—See COVENANT RUNNING WITH LAND.

ESTOPPEL.

Action for purchase money of land—Account stated—Plea of payment—Receipt under seal—Estoppel.

Plaintiff sold and conveyed to defendant certain land, the deed containing a receipt for the purchase money, \$800, with a receipt for same also indorsed. Plaintiff then sued defendant upon the common counts for the purchase money of the land, and on an account stated. The defendant pleaded, among other pleas, payment.

After the sale defendant told one M. that he had only paid plaintiff \$41, and offered to pay him (M.) whatever plaintiff was willing he should. It also appeared, though not very clearly, that plaintiff was present at this conversation:

Held, following *Sparling v. Savage*, 25 U. C. 259, that the plaintiff was concluded by the receipt in the deed, and that he could not recover on either counts.

Quære, whether the conversation between defendant and M. amounted to a statement of account, or anything more than an admission from which non-payment of the purchase money might be assumed.—*Casey v. McCall*, 90.

See **VERDICT** (by mistake.)

EVIDENCE.

Of reasonable and probable cause.]—See MALICIOUS ARREST.

Of natural water course.]—See WATERCOURSE.

See EXTRADITION.

“ PLEADING, 2.

“ COMMISSION TO EXAMINE WITNESSES.

“ CRIMINAL LAW.

“ MARINE INSURANCE.

EXCESSIVE DAMAGES.

See VERBAL EVIDENCE.

“ NEW TRIAL.

EXECUTION.

Priority over Chattel Mortgage.]—See PRIORITY.

“ NEW TRIAL.

“ TRESPASS.

EXECUTOR.

Debt due to, not garnishable.]—See GARNISHMENT.

EXHIBITS.

Effect of non-production before Appellate Court, when used in court below.]—See VERDICT (by mistake).

EXTRADITION.

Prisoners discharged—Re-arrest by different magistrate—His right to issue warrant outside his own county, in extradition cases—29 Vic. ch. 51, sec. 373—28 Vic. ch. 20—31 Vic. ch. 17, s. 4, (Ontario)—Depositions taken in foreign country after arrest in Canada—Admissibility in evidence—31 Vic. ch. 94.

The prisoners were arrested at T., under a warrant issued by M., on an information laid by B., charging them with robbery committed with violence in one of the United States of America, and stating the

information to be laid before “the undersigned, Police Magistrate in and for the County of the City of Toronto, amongst other Counties, appointed under and by virtue of the Act of Parliament of this Province, 28 Vic. ch. 20, entitled,” &c., &c. The warrant of arrest described M. as Police Magistrate for all these Counties, naming them in full, and the warrant of commitment as Police Magistrate for the County of Essex, amongst other Counties, appointed under and by virtue of the above Act (but no commission empowering him to act was produced on this application, which was for the prisoners’ discharge under a writ of *habeas corpus*). Under this warrant the prisoners were conveyed to S. in the county of E., and evidence was taken there before M. of the robbery in question, consisting of certain depositions taken in the United States before a Justice of the Peace there, on which an original warrant of arrest was issued by him. These depositions had been taken and warrant issued after the arrest at T. On this evidence the prisoners were committed to custody to await the warrant of the Governor General for their extradition to the U. S.

The prisoners, it seemed, had been previously arrested at T. on the same charge, and been discharged by the local Police Magistrate after a lengthened investigation had before him :

Held, that this discharge did not prevent another duly qualified officer from entertaining the charge against them on the same or on fresh materials.

Held, also, that sec. 373 of 29 Vic. ch. 51, did not preclude M. from taking the information of B.

and issuing his warrant in T., where there was already a Police Magistrate, for that the words of the section merely excluded him from jurisdiction there in local cases, but did not apply to cases arising under the extradition laws.

Held, also, that the appointment of M. might well have been made under 28 Vic. ch. 20, for any one or for all the Counties of Upper Canada, including T., and his powers made the same as a Police Magistrate in cities, except as regarded purely municipal matters, and that this Act was continued by 31 Vic. ch. 17, sec. 4, (Ontario); but that, as nothing was suggested in any way impugning the possession by M. of the authority to act, the ordinary rule must prevail and the warrant be treated as executed by an officer possessing such authority.

Held, also, that the depositions, on which the warrant issued in the U. S. after the arrest in Canada, were properly admitted here as evidence of criminality, their admission being within both the letter and spirit of the 31 Vic. ch. 94, (Can. Gaz. of August, 1868).

Remarks on the propriety of giving a liberal interpretation to the Extradition Treaty, and the inadequacy of its provisions to meet the class of felonies of most common occurrence in both countries.]—*Regina v. Isaac S. Morton and Charles E. Thompson*, 10.

FALSE IMPRISONMENT.

See QUARTER SESSIONS.

FI. FA.

Irregularity in.]—See TRESPASS.

Setting aside.]—See SETTING ASIDE PROCEEDINGS.

FINE.

Power of Quarter Sessions as to, in case of assault.]—See QUARTER SESSIONS.

GARNISHMENT.

Debt due judgment debtor, as executor, and assigned—Attaching order set aside—Costs.

A debt due by the garnishee to the judgment debtor, as executor, is not garnishable, nor a debt duly assigned to another, and the attaching order will be set aside by the Court; and, where the judgment creditor was aware that this answer would be made to his application by the judgment debtor, the latter was allowed the costs incident to such answer.—*Macaulay v. Rumball et. al.*—*Crabbe, Garnishee*, 284.

Conditional order.]—See TRESPASS.

HARBOUR COMPANY.

Pier Lights—Removal—Notice—Loss of vessel—Non-liability—General issue.

The defendants, a harbour company, on the 5th November, 1866, resolved to close their harbour upon and after that day, to discontinue the receipt of tolls, and to remove the light, which was placed on the western pier as a guide to the entrance; this determination having been come to in consequence of the water between the piers, and on the bar outside them, having become so shallow as to endanger the "larger class of vessels," which were in the habit of entering the harbour, and because the stormy weather had prevented their dredging it out. A printed notice of this

resolve was accordingly on that day put up at Port Burwell, and also sent to different Collectors of Customs, both in the United States and in Upper Canada, for publication in several newspapers, in which it was inserted. One of the notices was put up in the Custom House in Buffalo, and was also published in a newspaper there on 9th November. Plaintiff arrived in his vessel, from a port west of and beyond Port Burwell, on 7th November, having seen defendants' light on his way down, and on the 10th November he cleared again from Buffalo, on his return trip, and on the morning of 11th November, in his endeavour to enter defendant's harbour, in consequence of stress of weather, the vessel struck on the western pier and was lost, the immediate cause of the striking against the pier being, as appeared, the absence of the light, the presence of which would have enabled the vessel, which was of light draft, to enter. Up to the time of the accident neither plaintiff nor any one on board had any actual notice of the removal of the light :

Held, reversing the judgment of the Court of Common Pleas, 17 C. P. 574 :—

1st. That defendants had authority, under the circumstances, to close the harbour and remove the light.

2nd. That the notice of closing was sufficient, and that plaintiff was not entitled to actual personal notice of the fact.

3rd. That defendants were not, therefore, liable to the plaintiff for the loss of his vessel, and that they were entitled to a verdict on the plea of *not guilty*.

SWEENEY [DEFENDANT IN ERROR] v. THE PRESIDENT, DIRECTORS & COMPANY OF THE PORT BURWELL HARBOUR [PLAINTIFFS IN ERROR], 376.

IMPRISONMENT.

Power of Quarter Sessions as to.
—See QUARTER SESSIONS.

INCUMBRANCE.

Covenant against, running with land.—See COVENANT RUNNING WITH LAND.

INDEBITATUS ASSUMPSIT.

Agreement to divide land—Replication—Indebitatus assumpsit for work and labour.

Defendant agreed with his son that if he would remain and work with him, so as to assist in paying for a lot of land which he had purchased, he should be paid for his services by the property being divided with him. The son accordingly remained, worked upon the land for several years, and died. After his death defendant stated that he “had a conversation in his family, and he and his wife agreed to buy the land, keep the family together, and, when the land was paid for, divide the property among his sons :”

Held, that neither this conversation, nor a subsequent offer on defendant's part to pay plaintiff, as administratrix of the son, \$800, in satisfaction of the action, amounted to a repudiation or rescission of the only bargain between the father and son, which was to divide the land, and that, therefore, *indebitatus assumpsit* for the son's work and labour would not lie.]—*McClarty v. McClarty*, 311.

INDICTMENT.

Amendment of at trial.—See CRIMINAL LAW.

INDORSER.

Nonliability of.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

INFANT.

Cannot, during minority, avoid beneficial lease.—See EJECTMENT, 2.

INSOLVENCY.

1. *Assignment of policy of assurance to creditor—Validity*—27 & 28 Vic. ch. 17, sec. 8, sub-sec. 4, 5.

To avoid a transaction under the 4th sub-sec. of sec. 8 of the Insolvent Act of 1864, not only must there be a contemplation of Insolvency, but coupled with it a fraudulent preference of the creditor, to whom the transfer or payment is made, over the other creditors.

In this case the insolvent, about two months before the issue of a writ of attachment against him and his assignment consequent thereupon, assigned to defendant, a creditor, a policy of insurance upon certain merchandise, in security for a debt which was about to be placed in suit, and the insurance company, upon the occurrence of a fire, paid over the proceeds of the policy to the creditor, to the extent of the debt secured thereby. At the trial the plaintiff, who claimed, as assignee, to recover back this amount, called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency; that his intention was, with his remaining assets and the residue of the moneys derived from the policy, after paying defendant, to re-open

his business, but that he was driven into insolvency by the act of a certain creditor, who, though he had promised him time, sued out a writ of attachment against him:

Held, that the onus being cast upon the plaintiff of proving that the transfer of the policy was made by the debtor in contemplation of insolvency, (it not having been made within thirty days of the issue of attachment, or of the execution of the deed of assignment,) the evidence produced by him failed to establish this fact, and that the verdict, therefore, in favour of the defendant was right.

Held, also, that there was no fraudulent preference here, it not being urged or pretended, much less proved, that the assignment of the policy was the spontaneous act of the debtor, but it being a fair inference from the evidence that it was made in consequence of a demand of the creditor, who was pressing for payment of his debt.

Held, also, that sub-sec. 5 of sec. 8 clearly did not apply to this case, the money received by the defendant not having been a payment by the debtor unable to meet his engagements in full, but having been received under the assignment of the policy, and from the insurance company; that the assignment being valid it was quite immaterial whether, when the money was paid by the company, the defendant did or did not know of it, or had, or had not probable cause for believing in, the then validity of the insolvent to pay his debts in full.]—*McWhirter, Assignee, v. Thorne*, 302.

2. *Money received in ignorance of insolvency—Right of assignee to recover back—Pleading.*

Held, on demurrer to the plea set out below, that a payment made by an insolvent, after the issue of a writ of attachment against him, on account of a draft discounted by defendants for him, and which was dishonoured by non-acceptance, was recoverable back by the official assignee, though the defendants were ignorant of the insolvency when they received the money from him.]—*Roe v. Royal Canadian Bank*, 34.

Omission of creditor's debt from schedule.]—See PLEADING, 8.

Annexing schedule of debts to assignment.]—*Ib.*

Demand of assignment by creditors.]—See PLEADING, 10.

INSOLVENT.

Creditor's fi. fa. against set aside.]—See SETTING ASIDE PROCEEDINGS.

INSURANCE.

1. *Condition requiring particular account of loss—Non-compliance.*

One of the conditions of the policy in this case required the insured within thirty days after loss "to deliver in a particular account of such loss or damage, signed by their own hand and verified by their oath or affirmation, and by their books of account and other proper vouchers." The plaintiff sent in his affidavit, stating in general terms the value of the different kinds of goods destroyed, but without in any way mentioning his loss on the buildings insured, the mere statement as to them being that they had been totally destroyed, and without verifying his deposition by his account books or other proper vouchers:

Held, following *Greaves v. Niagara District Mutual Insurance Company*, 25 U. C. 127, clearly no compliance with the condition, and a non-suit was therefore ordered to be entered.—*Carter v. Niagara District Mutual Insurance Co.*, 143.

2. *Different subjects of insurance at separate amounts—Construction of policy—Liability of insurers..*

A policy insuring several different subjects of insurance at separate amounts, and containing a provision that "the Company shall be liable to pay to the insured two-thirds of all such loss or damage by fire as shall happen to the property, amounting to no more in the whole than the aggregate of the amounts insured, and to no more on any of the different properties than two-thirds of the actual cash value of each at the time of the loss, and not exceeding on each the sum it is insured for," is to be treated as a separate insurance upon each subject of insurance, and therefore the Company is liable only for two-thirds of the loss on each subject, notwithstanding that on some of the subjects the loss is less than the amount for which those subjects are insured, and notwithstanding that the whole loss is less than the aggregate amount insured.—*King v. The Prince Edward County Mutual Insurance Company*, 134.

See MARINE INSURANCE.

"EQUITABLE PLEADINGS.

JUDGE.

Duty of, in action of seduction, where evidence tends to establish rape.]—See SEDUCTION, 2.

JUDGE'S ORDER.

Laches in moving against.]—See LACHES.

LACHES.

Setting aside Judge's order.

Held, that an application not made until the last Thursday of Michaelmas Term, and for a rule returnable the following Term, to rescind a Judge's order, made 27th Oct. previously, discharging a summons to set aside a judgment and execution, was too late, and the rule was discharged with costs.—*Bank of Montreal v. Harrison*, 276.

LANDLORD AND TENANT.

Improvements by tenant—Suspension of rent.

Tenant agreed with landlord to make certain improvements upon the demised premises, tenant "to get the first three years' rent for said buildings and improvements, providing they are completed in the first two years:"

Held, that the rent was suspended during the two years, and that landlord could not, therefore, before the expiration of this period, eject for non-payment.—*Irwin v. Hunter*, 391.

LEASE.

By infant.]—See EJECTMENT.
See TROVER.

LIMITATION (STATUTES OF.)

Possession of land by caretaker employed to protect whole, sufficient to establish title to whole under statutes.]—See COMMISSION TO EXAMINE WITNESSES.

LOSS.

Non-liability of harbour company for loss of vessel.]—See HARBOUR COMPANY.

MALICIOUS ARREST.

Want of reasonable and probable cause—Evidence.

In an action for malicious arrest, the affidavit, on which the order for the *capias* issued, stated that the deponent (defendant) had been informed by certain parties, one Oliver and one Widdifield, that they had heard plaintiff state that he would soon "fix" his property, so that he could go to live with his daughter in the United States, and that plaintiff had led them to believe that he contemplated leaving Canada and putting his property out of reach of his creditors. At the trial plaintiff called Oliver, who at first flatly contradicted defendant's affidavit, but on cross-examination said that Widdifield had gone to see plaintiff, who owed him money, which however he did not get; that plaintiff said he had a daughter in the States, and if he had his business all right or all "fixed" he would go to her; that defendant was asking him (witness) about this, and he told him he did not know; that he did not tell defendant, in Widdifield's presence, that plaintiff was going away as soon as he got his property "fixed"; that he did not tell him so until the other day, since being up in town to attend this trial; that he did not "know" he had ever told him anything about it; that he had told Widdifield. With this evidence plaintiff closed his case, without calling Widdifield, who was then called on the part of the de-

fence, and stated that he knew plaintiff had been indebted to defendant for some time; that he accompanied Oliver on his visit to plaintiff, when Oliver offered him for some articles more than they were worth, in order to get his money, but plaintiff refused to let him have them; that plaintiff spoke of his daughter in the States, and said he would go there if he had all things right; that he wasn't making much on the farm, neither paying debts, nor making much more than a living; that there did not seem much prospect of his paying Oliver, and that he was owing a good deal; that he told defendant, on his return, that before long plaintiff would be off to the States; that plaintiff promised to call and see defendant about his debt, which he never did; that he (witness) had frequently told defendant he had better look out for himself or he would lose his debt; that defendant became more alarmed when he heard of plaintiff's having tried on a former occasion to abscond, when he was arrested and imprisoned, and that he (witness) had subsequently, in answer to an application for his discharge, sworn that he inferred from a conversation he had with him that he intended to get rid of his property and go to the States, and that he (witness) had informed defendant of this before the plaintiff's arrest:

Held, that the Judge should, on this evidence, as a matter of law, have held there was no want of reasonable and probable cause, and that a nonsuit ought therefore to have been entered.—*Baker v. Jones*, 365.

See NEW TRIAL REFUSED.

MARINE INSURANCE.

Unseaworthiness—Evidence.

In the former report of this case (18 C. P. 305) the court, though of opinion that the defendants were entitled to a nonsuit, granted a new trial, suggesting whether, if evidence were given of defendants' knowledge of the age, build, and material of which the vessel was built at the time of the insurance, it might not be held to modify the condition as to seaworthiness, so as to make it subordinate to the particular vessel being insured. On the new trial one H. was called by plaintiff, who proved that he, as defendant's agent, accepted the risk on the vessel in question; that he had seen but did not examine her, but judged her wholly from the registry, and insured her as B 1; that a B 1 vessel would be insured as readily as an A 1, the charge on freight being the same, and the seaworthiness would be expected to be the same, though the A 1 would not be so likely to go to pieces:

Held, that these facts did not bring the case within the principle laid down in *Burgess v. Wickham*, 3 B. & S. 669, and *Clapham v. Langton*, 34 L. J. Q. B. 46, and therefore *Held*, that the new evidence did not alter the position of the parties, and that a nonsuit had been again properly directed.]—*Coons v. Aetna Insurance Company*, 235.

MARRIED WOMAN'S ACT.

See PLEADINGS, 7.

MASTER AND SERVANT.

See CORPORATION.

MEASURE OF DAMAGE..

See COVENANT RUNNING WITH LAND.

MEMORANDUM.

Indorsed on lease—Construction.]—See TROVER.

MISDIRECTION.

See VERDICT (by mistake).

“ SEDUCTION, 2.

MISTAKE.

See VERDICT (by mistake).

MONEY.

Recoverable back by assignee, when received by creditor from insolvent in ignorance of insolvency.]—See INSOLVENCY, 2,

MORTGAGE.

Insufficiency of words in proviso to create a covenant to pay.]—See COVENANT TO PAY.

MORTGAGEE.

Of railway track, entitled to maintain ejectment.]—See EJECTMENT, 3.

MORTGAGOR & MORTGAGEE

Proviso for continuance in possession by mortgagor—Distress clause—Construction—27 & 28 Vic. ch. 31—Pleading.

A clause in a mortgage that the mortgagor shall continue in possession, coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in accordance with the

terms of clause 15 of the 2nd schedule to 27 & 28 Vic. ch. 31, creates the relationship of landlord and tenant at a fixed rent.

Held, also, that by the indenture of mortgage set out below, the tenancy created was until the day of repayment of the principal, for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises; but, *held*, on demurrer, that the avowries set out below, justifying under such a distress clause contained in a mortgage, were bad, as not alleging that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy, in pursuance of such permission, at the time of the distress, or at any time.—*Royal Canadian Bank v. Kelly*, 196.

2. 27 & 28 Vic. ch. 31—*Distress for interest—Goods of third parties—Pleading.*

To an action of replevin, charging a distress of plaintiff's goods, defendant avowed, setting out a mortgage made to him by one D., and which was pleaded as having been executed in pursuance of the act respecting short forms of mortgages, and averred that under the proviso therein the mortgagor was possessed of the premises, and occupied and enjoyed same as tenant of the mortgagee, and so continued to do until at and after said distress; that mortgagor made default in payment under the terms of the mortgage, but mortgagee did not enter by reason thereof, but permitted mortgagor to continue in occupation as his tenant as afore-

said, avowing the taking of plaintiff's goods as distress for arrears of interest:

Held, on demurrer, good; for that the occupation of the mortgagor under the terms and conditions of the mortgage set out constituted the relationship of landlord and tenant between the parties at a fixed rent, being the interest on the principal sum secured; that so long as such occupation continued with the will of the mortgagee he had the right to distrain for such interest "by way of rent reserved," and incident to that right was the right of distraining upon the property of third persons on the lands mortgaged; that the continuance of the mortgagor in possession, after the day named for payment, with the permission of the mortgagee, constituted him thereafter tenant-at-will of the mortgagee, and on the terms of distress contained in the mortgage. — *Royal Canadian Bank v. Kelly*, 430.

3. Mortgage—Proviso for tenancy—Construction—Ejectment.

By a mortgage in fee to secure the payment of \$1,490.42, by monthly instalments of \$12.42, it was provided that the mortgagor should become tenant to the mortgagees thenceforth, during their will, at the rent of one pepper corn monthly until default, and after default, at the yearly rent of \$149.04c., payable monthly. There was also a proviso that in case of default the mortgagees, without any previous demand of possession, might enter and sell:

On ejectment by the mortgagees, upon default, against a lessee of the mortgagor subsequent to the mortgage,

Held, that no notice to quit nor demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees at their option either to distrain or at any time to eject the mortgagor himself without demand; but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession.

If the mortgagor had been simply tenant at will, *Seem*, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy. — *Canada Permanent Building and Savings Society v. Byers*. 473.

NEGLIGENCE.

See RAILWAYS AND RAILWAY COMPANIES.

NEW TRIAL.

Execution—Delay—Chattel Mortgage—Priority—Trove—Excessive Damages.

On 23rd July, 1868, M. recovered judgment against J. for \$2,= 023.51, and issued *fi. fa.* against goods, the execution of which was delayed until the end of the following month by an application to amend. On the 3rd of October, 1868, J. gave plaintiff a chattel mortgage, which was registered the 6th of October, payable a year after date. J., with plaintiff's consent, continued his business, and had sold a large part of the chattels, when plaintiff (in January, 1869,) came to take possession. Thereupon the sheriff, whose previous action under the *fi. fa.*, if any, did not appear, but who had no autho-

rity for the delay, seized and sold the remaining goods, when plaintiff brought trover against him, plaintiff and defendant in the execution, and another who had joined in indemnifying the sheriff, contending that the delay in executing the *fi. fa.* gave his chattel mortgage priority. The jury gave a verdict for \$1510 against the sheriff and in favour of all the other defendants. This verdict, being inconsistent with any view of the facts, and exorbitant in amount, was set aside, costs to abide the event.—*McGivern v. McCausland, et al.*, 460.

See VERDICT (by mistake).

“ CORONER.

NEW TRIAL REFUSED.

Malicious prosecution — Evidence and judge's charge strongly in favor of plaintiff—Verdict for defendant—New trial refused.

In an action for having maliciously, and without reasonable or probable cause, had the plaintiff arrested on a criminal charge, though the judge at the trial charged strongly in plaintiff's favor, and the evidence appeared to be strongly in favor of the plaintiff, the court, nevertheless, refused to interfere with the verdict rendered for defendant, and discharged the rule for a new trial, but under the circumstances refused to give the defendant the costs of the application.—*Miller v. Ball*, 447.

See SEDUCTION, 2.

NON-DIRECTION.

Ground for new trial, when.]—See VERBAL EVIDENCE.

NONSUIT.

See MARINE INSURANCE.

“ MALICIOUS ARREST.

“ CORONER.

NOT GUILTY.

Plea of.]—See RAILWAYS AND RAILWAY COMPANIES.

See SEDUCTION, 1.

NOTICE.

Of closing harbour.]—See HARBOUR COMPANY.

NOTICE OF ACTION.

Arrest by magistrate—Notice of action—Omission of time and place—Insufficiency.

In an action against defendant, a Justice of the Peace, for the arrest and imprisonment of plaintiff, the notice of action stated that defendant assaulted plaintiff, imprisoned and kept him in prison for a long time, to wit, four days, and caused him to be illegally arrested, and gave him into the custody of a constable, and illegally committed and sent him in such custody to the jail at the town of Lindsay, and caused him there to be confined for a long time:

Held, insufficient, as omitting to state where and when the assault took place, and the evidence being confined to the imprisonment at Lindsay.—*Parkyn v. Staples*, 240.

NUISANCE.

See DISPUTED SURVEYS.

ORDER.

Laches in moving against.]—See LACHES.

PARTNERS.

See RAILWAYS AND RAILWAY COMPANIES.

PAYMENT.

Of claim by dowress before judgment or eviction]—See PLEADING, 4.

PETITION.

Under C. S. U. C. ch. 93, s. 6.]—See DISPUTED SURVEYS.

PIER LIGHTS.

Removal by Harbour Co.]—See HARBOUR CO.

PLEADING.

1. *Justification as receiver appointed by Court of Chancery—Pleading.*

Replevin.

Defendants made cognizance and alleged that under a decree of the Court of Chancery, in the cause in which defendant Lepad was plaintiff, and one Vanderbeck was defendant, defendant Armour was appointed receiver of the partnership property of the late firm of Lepad and Vanderbeck, who “were the parties to the said suit in Chancery, and Armour, as receiver, and Lepad, as his servant and by his command, took and detained the timber in the declaration mentioned, as and being a portion of the said partnership property, which, &c.”

Held, on demurrer, bad.—*Campbell et al. v. Lepad et al.*, 31.

2. *Action on bond*—8 & 9 Wm. 3 ch. 11—*Plea of payment into court*—*Receipt*—*Construction*—*Evidence*.

Debt on bond with conditions,

and of which being that defendant should deliver to plaintiff in F., at the current price during delivery, twelve cords of wood during the next winter after date of bond, and each following winter, until, &c.: *Breach*, the non-delivery of the wood in the winter next following date of bond, and in the two succeeding winters.

Defendant pleaded, as to part of the breach assigned, payment of \$25 into court, which was sufficient, &c., and as to the remainder of the breach, performance:

Held, on demurrer, a bad plea.

Held, also, that plaintiff was entitled to demur to the plea, and was not obliged to apply to strike it out.

A receipt produced at the trial, as evidence of payment of a couple of sums payable 1st November, 1867, was in these words:

“\$35. FERGUS, 9th Nov., 1867.

Received from Mr. Robert Morice the sum of thirty-five dollars, being the amount due of him for the instalment ending 1st November, 1867, of a bond. ROBERT LOWE.”

Held, no evidence of payment on 1st November, for that the construction of the receipt (and the question was one of construction, and not of presumption) was an acknowledgment of payment, made on the day it bore date, of a sum of money due on 1st November.—*Lowe v. Morice*, 123.

3. *Bills of exchange and promissory notes*—*Stamps*—27 & 28 Vic. ch. 4—29 Vic. ch. 4—*Pleading*.

Declaration, on promissory note, against endorser.

Plea, that at the time plaintiff became a party to said note proper stamps were not affixed until a long time after.

Replication, that note endorsed in blank to plaintiff, who, while holder and before maturity, affixed double stamps, and thus note became valid in plaintiff's hands :

Held, on demurrer, replication bad, as not averring that as soon as plaintiff became aware that the proper stamps had not been affixed to the note by the proper parties at the proper time, he affixed stamps to double the original duty.—*McCalla v. Robinson et al.*, 113.

4. *Covenant for quiet enjoyment—Claim by dowress—Payment before judgment or eviction—Pleading.*

Plaintiff sued defendants as executors of one Thomas Grafton, setting out that the latter and one James Grafton sold certain land to plaintiff, and that Thomas Grafton covenanted for quiet enjoyment as against the vendors or any person claiming or to claim under them or either of them : *Breach*, that afterwards, while plaintiff was in possession, one F. G., lawfully claiming under James Grafton, as his widow, to have dower in said land, and having good title to have her dower, &c., &c., made her claim to said dower against plaintiff, as tenant in possession, and threatened to evict and would have evicted plaintiff from one-third of the land ; and plaintiff, in order to protect himself from eviction, was compelled to pay and did pay \$150, and he was thereby greatly disturbed, &c., and not able quietly to enjoy, &c., and in consequence plaintiff was damnified, &c., and compelled to pay said sum and other large sums to compromise and settle the claim of said F. G., and in procuring a release from her, &c., &c.

Held, on demurrer, declaration

good ; for that plaintiff was not obliged to have delayed settling the claim of F. G. until a judgment in dower had been obtained by her against him, much less until he had been evicted by her from the land.—*McClure v. Grafton et al.*, 149.

5. *Accord and satisfaction after action—Pleading.*

To an action on the common counts for goods sold and delivered, defendant pleaded, in effect, that after action plaintiff and defendant accounted together, and that upon such accounting the sum of \$60 and no more was found due from defendant to plaintiff on such accounts, and it was then agreed between them that defendant should deliver, and he did deliver, to plaintiff, who then accepted and received from defendant, a certain promissory note for \$60, in full satisfaction and discharge of the several causes of action, and of all the plaintiff's costs of suit :

Held, a good plea in accord and satisfaction.—*Freeman v. McCarthy*, 229.

6. *Bills of exchange and promissory notes—Pleading.*

To an action on a promissory note for \$800 defendant pleaded, in substance, that D. & Co. had contracted with defendant for delivery to him of plaster to the value of \$1,000, for which defendant agreed, on delivery, to pay by accepting D. & Co.'s draft at three months, payable to their own order ; that D. & Co., after having delivered but \$200 worth of plaster, requested defendant, who agreed to accept, and did accept their draft, upon their promise and agreement that defendant should upon its maturity pay no more of it than he had re-

ceived value in plaster; that, thereupon, D. & Co. being indebted to plaintiffs in \$50,000, indorsed and delivered the draft so accepted to plaintiffs, who received it as security for and on account of said debt, with the full knowledge and notice of the facts *hereinbefore* stated; that when said draft matured D. & Co. had delivered to defendant no more plaster than the said value of \$200, and plaintiffs and D. & Co. agreed that defendant should only pay \$200, and that defendant should make and deliver to D. & Co., or order, and D. & Co. should endorse and deliver to plaintiffs said promissory note for \$800, and that said note should be taken and received by D. & Co. and plaintiffs upon the same agreement and terms, as to delivery of plaster, as the draft for \$1,000 had been made and delivered upon:

Held, on demurrer, a bad plea.—*Royal Canadian Bank v. Minaker*, 219.

7. *Pro. note to wife before marriage—Debt partly due to a wife in representative character—Accord and satisfaction entered into with her—Married Woman's Act—Pleading.*

To an action by husband and wife, on a promissory note for \$600, made to the wife before marriage, defendant pleaded that the wife was formerly the widow of one C., to whom defendant had been indebted in \$400; that she subsequently took out letters of administration to his personal estate, and that afterwards defendant became indebted to her in \$200; that the note declared on was for these two sums, and that after its maturity, with the knowledge and assent of her husband and co-plaintiff, she agreed with defendant to accept from him

a conveyance in fee of certain lands in full satisfaction and discharge of her claim on said note; that defendant accordingly executed a proper deed of said lands to her, duly registered and tendered the same to her before action, and that she never expressed any dissent from said agreement until after said tender:

Held, on demurrer, a bad plea; first, as not averring that there was no marriage settlement, so as to bring the case within the provisions of C. S. U. C. ch. 73; secondly, because the accord and satisfaction attempted to be set up being, as to two-thirds of the amount, in respect of a sum due to the wife in her representative character, was not pleaded as having been made with her husband; thirdly, because what was pleaded was the *agreement to* accept a deed in satisfaction, but the *acceptance* in satisfaction was not only not pleaded, but was shewn by the plea not to have taken place:

Held, also, that had it been the agreement to convey the land which was averred to have been accepted, it would have been bad, as not having been alleged to have been in writing, without which plaintiffs would have had no remedy.

McKechnie v. McKechnie, 7 Gr. 23; *Muir v. Dunnette*, 11 Gr. 85; *Childers v. Childers*, 3 K. & J. 315, distinguished.

Semble, that the words in the Married Woman's Act, "free from the debts and obligations of her husband and from his control and disposition without her consent," are not to be construed as giving to the wife absolute control and disposition *without his consent*, and remarks upon the danger to her of a different construction.—*Balsam and Wife v. Robinson*, 263.

8. *Insolvency—Annexing schedule to assignment—Omission of debt from schedule—27 & 28 Vic. ch. 17, s. 9, sub-secs. 3, 10, 11, 12—Pleading.*

Plea, to declaration on a promissory note, that defendant, being insolvent within the Act of 1864, called a meeting of creditors and duly made an assignment in duplicate under the statute, and after a year from its date, not having received the statutory consent from his creditors, he duly obtained his absolute discharge from the judge for plaintiff's and all other debts.

Replication, that plaintiff's name, as a creditor, and the said pro-note and cause of action, were not mentioned in defendant's schedule annexed to his deed of assignment, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate:

Held, on demurrer, replication good; that it is still necessary, under the Insolvent Acts, to have a schedule of creditors prepared or annexed to the deed of assignment; and that the effect of the discharge obtained, under the Insolvent Act of 1864, by an insolvent, is limited to the debts and causes of action set forth in his schedule, either originally or by supplement. — *King v. Smith*, 319.

9. *Administration bond—Breach that administrator did not well and truly administrate according to law—Pleading.*

In an action against the sureties in an administration bond, plaintiff assigned as a breach of the condition of the bond set out, and which condition was in exact accordance with the form prescribed by 33 Geo. III. ch. 3, and 22 & 23 Car. II. ch. 10, that although a large amount or value of goods, &c., of

the deceased had come to the hands of the administrator, he had not well and truly administered the same according to law:

Held, on demurrer, a bad breach of the condition of the bond, and that the only two modes in which a valid breach of this condition can be assigned are, non-feasance in not duly collecting and getting in the estate, whereby it is lost or endangered, or malfeasance in wasting the assets collected by conversion of the same to the administrator's own use, or some other misappropriation whereby the estate is diminished to the prejudice of those entitled to have it forthcoming in the hands of the administrator to abide the orders of the court. — *Neil v. McLaughlin*, 350.

10. *Insolvency—Demand of assignment—27 & 28 Vic. ch. 17, sec. 3—Pleading.*

Declaration, that plaintiff and another carried on business under name of "Magill Bros.," were in good credit, and solvent, and had not ceased to meet their commercial liabilities; that defendants, being creditors for sums exceeding \$500, maliciously intending to injure plaintiff, and destroy his business and credit falsely, &c., and without reasonable, &c., cause, made a demand in writing on said firm in the form "E" in the schedule to the Insolvent Act of 1861; that within five days thereafter defendants refused to abandon said proceedings, but, as a condition, insisted that plaintiff should retire from said firm, and that certain security for a composition on debts of said firm should be given, or defendants would proceed; that the trade and credit of the firm were much injured, and that, in consequence of

defendant's proceedings, plaintiff was put out of said firm, without receiving any share of the assets, &c. :

Held, on demurrer, bad, as shewing that the proceedings on the demand terminated against plaintiff instead of in his favor, and as disclosing a state of facts, in the submission of plaintiff to the demand, instead of controverting its reasonableness, which shewed that defendants had reasonable grounds for taking the proceedings complained of.—*Magill v. Samuel et al.*, 443.

See QUARTER SESSIONS.

“ MORTGAGOR AND MORTGAGEE, 1.

See VARIANCE.

“ INSOLVENCY, 2.

“ COMMON SCHOOLS.

“ COVENANT TO PAY.

“ BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

See MORTGAGOR AND MORTGAGEE, 1, 2.

See PRINCIPAL AND SURETY.

Sufficient evidence of to support indictment.—See CRIMINAL LAW.

POSSESSION.

Of portion of land by care taker.]

See COMMISSION TO EXAMINE WITNESSES.

Sufficient evidence of to support indictment.—See CRIMINAL LAW.

Effect of clause in mortgage for continuance in possession by mortgagor, coupled with his occupation, and with statutory distress clause.—See MORTGAGOR AND MORTGAGEE, 1.

PRACTICE.

In trying issue in fact first, where issue in law also on record.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

PRINCIPAL AND SURETY.

Clerk or teller in Bank—Pleading.

The declaration set out a deed executed by plaintiffs, one B., and defendant, reciting that B. had been appointed by plaintiffs a clerk in their bank at K. or elsewhere, as might be determined upon, B. covenanting during his service as clerk, *or in any other capacity whatsoever*, to be faithful in his conduct, render proper accounts, obey orders, pay moneys, not embezzle, &c., &c., make good any loss caused by his misbehaviour, &c., &c.; and defendant covenanting that B. should well and truly perform all his covenants; *averment*, that B. entered the bank as a clerk, and while in such employ, &c., (charging certain breaches of covenant by B. in the capacity of teller, misapplication of moneys, &c.)

Plea, that before breach B. was, without defendant's consent, removed by plaintiffs from the situation of clerk to that of teller, which was another and different office, and in which he was entrusted with far larger moneys than in his former position, and his responsibility entirely changed and increased :

Held, on demurrer, bad.—*Royal Canadian Bank v. Yates*, 439.

PRIORITY.

Chattel mortgage to agent—Repudiation by principal—Intervening execution—Priority—Sufficiency of affidavit.

H. and I. being indebted to a certain Bank, arranged with the plaintiff, Taylor, the Bank's agent at H. where the debt arose, that, in order to secure the same, a chattel

mortgage should be given to him and the other plaintiff, the Bank's General Manager in Canada. Taylor had no express power to bind the Bank to take this security, and his co-plaintiff was at the time absent from the country and ignorant of the transaction. A mortgage was accordingly drawn up, dated 22nd June, 1867, and purported to be made between H., I. and S., of the first part, and the plaintiffs, as trustees for the Bank, of the second part, reciting that the parties of the first part were indebted to the Bank in certain bills of exchange, and witnessing that H. in consideration, &c., assigned to plaintiffs certain household furniture in his residence, with proviso that the mortgage was to be void on payment by parties of the first part of the bills of exchange. On the Court of Directors in England being apprised of the transaction both by Taylor and by his co-plaintiff, in a report made to them by the latter in condemnation of it, they at once repudiated it, and on 22nd August following wrote Taylor distinctly to that effect; and when their letter reached him, on 5th September, the goods were still in Hill's possession, and nothing had been done under the mortgage beyond recording it. On 7th September Taylor resigned his position in the Bank, and on 16th September defendant's execution against the goods of Hill and Irvine was placed in the Sheriff's hands. In the following October the Bank instructed Taylor's successor to realize the security :

Held, that the Bank, by their repudiation of the mortgage, had let in defendant's execution, and that their subsequent ratification of Taylor's acts and adoption of

the security could not defeat the writ.

The affidavit annexed to the chattel mortgage was made by Taylor, who swore that H., I. and S., "the mortgagors in the above bill of sale, by way of mortgage, named, are justly and truly indebted to me this deponent and Thomas Paton, as Trustees for * * * in the sum, &c. ; that said bill of sale was executed in good faith and for the express purpose of securing the payment of the money so justly due as aforesaid and *not for the purpose of protecting the goods and chattels mentioned in the bill of sale, by way of mortgage, against the creditors of said H., I. and S., the mortgagors therein named, or preventing the creditors of the said mortgagors from obtaining payment of any claim against them*" :

Held, following *Fraser v. Bank of Toronto*, 19 U. C. 381, that the affidavit was sufficient.

Quære, per Gwynne, J., whether the mortgage in question could be said to be within the Statute at all, having been taken without the assent of the Bank, to whom the debt intended to be secured was due, and whether such a debt could, within the meaning of the Act, warrant an unauthorized and self-constituted trustee for the creditor in making the necessary affidavit, that the mortgagor was justly and truly indebted to him, so as to comply with the provisions of the Statute.—*Taylor et al v. Ainslie*, 78

See NEW TRIAL.

PROBATE OF WILL.

Notice of intention to use, as proof of will, good for any subsequent trial.—See EJECTMENT, 1.

PROHIBITION.

See DIVISION COURT.

—♦—
QUARTER SESSIONS.

Quarter Sessions a Court of Record
—Assault—Fine and costs of prosecution—Imprisonment—Warrant not necessary—Sheriff—Trespass and false imprisonment—Pleading.

Held, on demurrer to the pleas set out below:—1. That the Court of Quarter Sessions in this Province is a Court of Record.

2. That such Court has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in default of payment.

3. That a warrant of commitment under the seal of the Court or signature of the chairman is not necessary.

4. That trespass will not lie against a Sheriff for executing the mandate of the Court, by committing and detaining until the fine and costs are paid, even though the latter may be unascertained at the time they are directed to be paid, and though that fact may, on *certiorari* and *habeas corpus*, entitle a prisoner to his discharge.

The second count of the declaration set out that plaintiff, at the Quarter Sessions, was convicted of two common assaults and was sentenced to pay a fine of \$1 and the costs of prosecution, and to remain in gaol till said fines and costs were paid; and defendant, being Sheriff, without sufficient warrant or authority, unlawfully arrested plaintiff and kept him in gaol for six hours, and plaintiff, being desirous of procuring his discharge, tendered to defendant \$20 as the amount of said fine and costs respectively,

which plaintiff believed to be a sufficient sum for that purpose, and then demanded his discharge, but defendant refused to accept same or to release plaintiff, and refused and neglected to inform plaintiff, although requested, what sum defendant required from plaintiff to entitle him to his discharge, whereby plaintiff was prevented paying the full and proper amount of the fines and costs, although willing so to do, and to procure his discharge, and after said tender, &c., defendant unlawfully detained plaintiff in custody, &c., &c. :

Held, on demurrer, a count in trespass and false imprisonment, and as such bad.

Quære, whether, if the count had directly charged it as a duty incumbent on the Sheriff to give the information said to have been requested of him, and assigned as a breach a neglect or refusal on his part to give the same, it would have disclosed a good cause of action in case.

Quære, also, as to the propriety or impropriety of the Court of Quarter Sessions directing imprisonment to be continued until costs as well as fines be paid. — *Ovens v. Taylor*, 49.

—♦—
QUIET ENJOYMENT.

Covenant for,]—See PLEADING, 4.

—♦—
RAILWAYS AND RAILWAY COMPANIES.

Amalgamation—Accident—Negligence—Liability—Plea of not guilty.

By 29 & 30 Vic. ch. 92 an agreement, dated 7th July, 1864, between the defendants' Company and the Grand Trunk Railway Company of Canada is set out, and by sec. 7 it is enacted that the Act is not to

come into force until accepted by the shareholders of the respective Companies in the manner therein provided. By 31 Vic. ch. 19, sec. 6, this agreement, according to date and condition of acceptance, is recited, as also the fact of the acceptance of such agreement by the Companies; and it is then enacted that the said Companies may, during the continuance of such agreement, alter and vary the terms thereof, &c., &c. By the Interpretation Act (31 Vic. ch. 1, sec. 6, sub-sec. 38) every Act is to be deemed a public Act, unless expressly declared to be a private Act, and it is to be judicially noticed by the Judges, &c., without being specially pleaded. The agreement between the two Companies, set out in the above Act, is for the working of defendants' lines by the Grand Trunk Railway Company from 1st July, 1864, for twenty one-years; the net receipts, with certain deductions, to be divided in certain proportions between the two Companies; the control and working of defendants' road from the time of its being handed over to the Grand Trunk Railway Company, to be placed in the hands of the latter under a joint committee selected from the boards of each Company, and the defendants' railway and appurtenances during the said term to be kept in good repair, &c.

The plaintiff, in this case, sued the defendants for injury to his land caused by fire emitted from a steam engine, which was being propelled along defendants' line of road, alleging negligence in the management of the said engine, &c., &c. The evidence at the trial clearly shewed that since 1864 the Grand Trunk Railway Company had

worked the line, and that defendants, as a Company, had had nothing to do with the working; that all the alleged damage was caused by the Grand Trunk Railway Company's engines and servants, and that defendants beyond their ownership of the road, were unconnected with the injuries complained of:

Held, that defendants were not liable; and that the plea of not guilty simply raised the whole defence which ought to prevail to the action.

Held, also, that ch. 19 sec. 6 of 31 Vic. not merely *recited* the fact of agreement of 1864 being accepted, but that it legislated upon it as accepted and binding, in its enacting part; but *Seemle*, that even if merely recital, it would be good *prima facie*, though not conclusive evidence of the fact.

Held, also, that because defendants were to receive a portion of the net profits, they were not, on that account, to be considered partners and liable as such.—*McCallum v. Buffalo and Lake Huron Railway Company*, 117.

Ejectment by Mortgagee of Railway Track.—See EJECTMENT, 3.

RAPE.

Evidence of, in action of seduction.—See SEDUCTION, 2.

RE-ARREST.

By different magistrate, of discharged prisoner.—See EXTRADITION.

REASONABLE AND PROBABLE CAUSE. (WANT OF).

See MALICIOUS ARREST.

RECEIPT FOR MONEY.

Construction of.]—See PLEADING, 2.

Receipt, in deed, for purchase money.]—See ESTOPPEL.

RENT.

Suspension of.]—See LANDLORD AND TENANT.

RENT CHARGE.

Assignment of rent—Clause of Distress—Rent seck or rent charge—Distress in grantee's own name—4 Geo. II, ch. 28.

A landlord, after leasing certain premises, by deed "assigned, transferred, and set over" to M. two instalments of the rent reserved, and appointed him his attorney to sue for, collect or levy by landlord's warrant, if necessary, in his (the landlord's) name: *Held*, that the instrument contained a grant, and of a rent charge, as an incorporeal hereditament, accompanied with a clause of distress, and therefore not of a rent seck, and that B. could distrain for the rent in his own name; but that, whether rent charge or rent seck, he had equally the power of distress under 4 Geo. II. ch. 28.—*Hope v. White*, 479.

RENT SECK.

See RENT CHARGE.

REPLEVIN.

See PLEADING, 1.

REPUDIATION.

By principal, of agent's authority.]—See PRIORITY.

See INDEBITATUS ASSUMPSIT.

RESCISSION.

See INDEBITATUS ASSUMPSIT.

REVOCATION.

Of Covenant to indemnify sheriff against seizure.]—See EQUITABLE PLEADINGS, 2.

SALE OF GOODS.

See WRITTEN CONTRACT, 2.

SALE OF LAND.

See COVENANT RUNNING WITH LAND.

SEDUCTION.

Parent resident abroad—General issue—Right to maintain action.

Held (Hagarty, C. J., dissentiente), that the parent may maintain an action for the seduction of his daughter, though resident abroad at the birth of the child, and a cause of action at common law vested in a master, whom she served.

Held, also, that the question may be raised by the defendant under a plea of not guilty.—*Cromie v. Skene*, 328.

2. *Evidence of rape—Duty of Judge in such case—Misdirection—Verdict for plaintiff—New trial refused.*

Held, following *Brown v. Dalby*, 7 U. C. 160, that the defendant, in an action of seduction, cannot move against a verdict in favour of the plaintiff, as contrary to law and evidence, on the ground that the evidence of the witness shewed that a rape had been committed upon her.

Per Gwynne, J., that it is the duty of the judge to decide wheth-

er the case is in a fit position to be tried, and, if the evidence in law constitutes felony, it is not in a fit position for trial. In such case, if the plaintiff refuses to be non-suited, the judge should discharge the jury until the criminal defence has been disposed of.

In this case the judge was of the opinion that the woman did not intend to impute a criminal charge ;

Held, per Gwynne, J., that he would have been right in leaving the case to the jury in the ordinary way, but that he was wrong in accompanying it with the direction to find whether, in *their* opinion, a felony had been committed.—*Walsh v. Nattrass*, 453.

SETTING ASIDE PROCEEDINGS,

Insolvency—*Proof of debt by creditors*—*Fi. fa. by same creditor set aside*.

The plaintiff issued a *fi. fa.* lands on 7th June, 1865, and renewed it from time to time until 4th June, 1867. On 30th March, 1867, defendant obtained his discharge in Insolvency. Plaintiff had proved his claim for the full amount of the judgment in the Insolvent Court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so :

The Court set the *fi. fa.* aside with costs.—*Dickson v. Bunnell*, 216.

SHERIFF.

Trespass will not lie against, when.]
—See QUARTER SESSIONS.

Covenant to indemnify against seizure, revocation of.—See EQUITABLE PLEADINGS, 2.

STATUTES (CONSTRUCTION OF.)

22 and 23 Car. II. ch. 10.]—See PLEADING, 9,

29 Car. II. ch. 3, s. 17.]—See WRITTEN CONTRACT, 2.

8 & 9 Wm. 3, ch. 11.]—See PLEADING, 2.

4 Geo. II. ch. 28.]—See RENT CHARGE.

33 Geo. III. ch. 3.]—See PLEADING, 9.

Con. Stats. C. ch. 54.]—See WAREHOUSE RECEIPTS, 1, 2

Con. Stats. C. ch. 99, s. 78.]—See CRIMINAL LAW, 1.

C. S. U. C. ch. 32, sec. 5.]—See WITNESSES AND EVIDENCE.

Con. Stat. U. C. ch. 57.]—See WATERCOURSE.

Con. Stat. U. C. ch. 64.]—See COMMON SCHOOLS.

Con. Stat. U. C. ch. 15, s. 67.]—See APPEAL.

Con. Stat. U. C. ch. 73.]—See PLEADING, 7.

Con. Stat. U. C. ch. 93, s. 6.]—See DISPUTED SURVEYS.

23 Vic. ch. 49, sec. 12.]—See COMMON SCHOOLS.

24 Vic. ch. 23, sec. 1.]—See WAREHOUSE RECEIPTS, 2.

27 & 28 Vic. ch. 17, s. 3.]—See PLEADING, 10.

27 & 28 Vic. ch. 17, s. 8, sub-secs. 4, 5.]—See INSOLVENCY, 1.

27 & 28 Vic. ch. 17, sec. 9, sub-secs. 3, 10, 11, 12.]—See PLEADING, 8.

27 & 28 Vic. ch. 4.]—See PLEADING, 3.

27 & 28 Vic. ch. 31.]—See MORTGAGOR AND MORTGAGEE, 1, 2.

28 Vic. ch. 20.]—See EXTRADITION.

29 Vic. ch. 4.]—See PLEADING, 3.

29 Vic. ch. 51, sec. 373.]—See EXTRADITION.

29 & 30 Vic. ch. 51, sec. 177.]—See CORPORATION.

31 *Vic. ch. 17, sec. 4.*]—See EXTRADITION.

31 *Vic. ch. 19, sec. 6.*]—See RAILWAYS AND RAILWAY COS., 1.

31 *Vic. ch. 94.*]—See EXTRADITION.

SUBSTANTIAL DAMAGES.

See COVENANT RUNNING WITH LAND.

SURVEYS.

See DISPUTED SURVEYS.

SUSPENSION OF RENT.

See LANDLORD AND TENANT.

TENANT.

Of mortgagor subsequent to mortgage, not entitled to notice to quit or demand of possession.]—See MORTGAGOR AND MORTGAGEE, 3.

TENANT AT WILL.

Mortgagor becomes such, how.]—See MORTGAGOR AND MORTGAGEE, 2, 3.

TENANT IN COMMON.

When he may and may not maintain trespass or trover against his co-tenant.]—See TRESPASS TO LAND.

TRESSPASS.

Conditional garnishee order—Execution thereunder—Irregularity.

Defendant obtained a garnishee order directing execution to issue against the plaintiff, but the order was conditional, giving the garnishee the opportunity to contest the claim, on payment of certain costs within a time fixed, after the

fi. fa. issued, plaintiff not having availed himself of the alternative allowed by the order. It appeared that both parties were present when the order was made, and that there had previously been a good attaching order. No motion was made to set aside the *fi. fa.*, which appeared good on its face, but plaintiff brought trespass against defendant for the seizure under the writ, as having been issued on a conditional and void order :

Quære, whether the order was void ; but if so, *Semble*, that the *fi. fa.* was at most irregular, and might have been set aside on motion ; and therefore, *Held*, that, as nothing appeared either on the face of the record or on the evidence making the writ a void process, defendant was protected by it and trespass would not lie against him.—*Kerns v. Phelan*, 288.

Will not lie against sheriff for executing mandate of Court of Quarter Sessions to commit and detain until sentence of Court complied with.]—See QUARTER SESSIONS.

Nor against a Coroner acting judicially.]—See CORONER.

TRESPASS TO LAND.

Trover—Tenants in common—Payment by allowance on note—Conversion.

H., by agreement with defendant, planted 16½ acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work and that defendant was to receive for his share as much Indian corn as should represent the portion of the land sown with sugar-corn and potatoes, and one-third of the Indian

corn, and that H. was to have the remainder.

Subsequently H., being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own and harvested it :

Held, 1st. That plaintiff could not sustain an action against defendant upon a count in trespass to his (plaintiff's) land.

2nd. That H. and defendants were tenants in common of the crop of Indian corn.

3rd. That one tenant in common cannot maintain an action of trespass or trover against his co-tenant for the mere act of his reaping and harvesting the crop ; but he may do so, if his co-tenant has consumed the crop or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it.

4th. That, on the finding of the jury in this case. the plaintiff must be taken to have paid the full price of the crop at the time of the bargain for its purchase, and the delivery being as complete as the circumstances would admit of, H's interest passed at that time to the plaintiff and could not be divested by the subsequent sale to defendant.

5th. That under the circumstances of the case the court might assume after the verdict, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion.—*Brady v. Arnold*, 42.

TROVER.

Lease—Unsigned memorandum indorsed on—Construction of—Way-going crops—Trover.

Plaintiff, by deed, leased from one S. certain land for five years from 1st October, 1862, agreeing thereby to give up possession on the expiration of the term created. On the lease was indorsed an unsigned memorandum to the effect, that if plaintiff cleared any more land than was then cleared he was to have the same rent free, for the first three years, for clearing and fencing the same. No land was cleared by plaintiff until the fall of 1865, and in the fall of 1867 he put in a crop of wheat. After the expiration of his term under the lease he asked permission from S. to remain on the premises, until the latter wanted them, and in the following April he left of his own accord, giving up to S. the place with all that was on it. In the June following S., by deed, leased the land and crops thereon to two of the defendants for five years from the 7th January previously, and subsequently to this, when the wheat had ripened, plaintiff entered upon the land, then in defendant's possession under S., and cut the crops. After adjudication of a complaint, as for a trespass, made before a magistrate, defendants took possession of the wheat, which was in shocks on the land, and plaintiff then sued them in this action, in trover :

Held, that the memorandum, not being by deed, could not operate as a lease for three years, because it was intended to commence from a time future, viz : from the clearing of the land, and that, therefore, unless it was taken as part of the lease, which was the most favour-

able construction for plaintiff, it was void under the Statute of Frauds; but that, taking it as part of the lease, it must be construed as co-extensive only with the lease, and not as extending its duration beyond 1st October, 1867.

Held, also, that the memorandum could not operate so as to transfer to plaintiff the right of entering in 1868 on the possession of defendants and taking the crops in the ground, the property in which had passed to them under the lease from S., and which, moreover, the evidence shewed plaintiff had before this expressly surrendered, with the land, to S.; nor, on the authority of *Burrowes v. Cairns et al.*, 2 U. C. 288, could the plaintiff claim, as an outgoing tenant, the wheat, as a way-going crop, and that he was not, therefore, entitled to recover against defendants.—*Kaatz v. White et al.*, 36.

See NEW TRIAL.

“ TRESSPASS TO LAND.

UNSEAWORTHINESS.

See MARINE INSURANCE.

VARIANCE.

Bond payable at particular place and on surrender—Right to recover without averring presentment there, and tender of surrender—Variance between declaration and bond.

The bond produced acknowledged defendants to be indebted to the holder thereof in the sum of £ * * and do hereby promise to pay the same to such holder at the agency of the Bank of Montreal at Ottawa, on &c., on the surrender of this bond, with interest at the rate of, &c., payable, &c., upon

presentation of the several warrants or coupons hereunto annexed at the agency of the Bank of Montreal in the City of Ottawa aforesaid.” The declaration stated that defendants by their bond, sealed, &c., became bound to the holder thereof in the sum of, &c., with interest, &c, to be paid to such holder thereof on, &c., and that plaintiff became holder thereof, yet said sum, with interest had not been paid.

It was admitted at the trial that the bonds were not presented at the place where they were made payable, and it was proved that, if they had been so presented, defendants had not had funds there to meet them :

Held, that there was no variance between the bonds declared on and those produced, in the former being stated to be payable to holders generally, while the latter were payable only on surrender and at a particular place ;

Held, also, that it was not necessary for plaintiff, as a condition precedent to his recovery, to aver and prove presentment at the particular place and a tender of the surrender of the bonds, or a readiness to surrender them:—*FELLOWES v. OTTAWA GAS Co.*, 174.

See WRITTEN CONTRACT, 2:

VERBAL EVIDENCE.

Written contract—Verbal evidence to explain technical term—Non-direction as ground for new trial—Excessive damages—Weight of evidence.

Defendants contracted in writing to purchase from plaintiff 1000 “ prime ” saw logs, at so much per 1000 cubic feet, which defendants sent their agent to cull and mea-

sure. Plaintiff charged the agent not to select any that did not conform to the contract, but notwithstanding this the agent, without complaint or comment, marked the logs with defendants' mark, designating them as of *two* qualities, and defendants, instead of refusing them, accepted and used them, without informing plaintiff of the mode adopted by their agent, or giving him the opportunity of shewing that the logs did in fact conform to the contract, and at the same time refusing to pay for the second quality more than half the price agreed to be paid for "prime" logs. On the trial of an action brought to recover the full contract price of the logs (for which the jury gave a verdict), a witness called by plaintiff was asked to explain the meaning of the word "prime," and as he stated that the word had no technical meaning, and was not used in the trade, his evidence was objected to by defendants' counsel, but received by the learned judge :

Held, that the evidence under the circumstances was admissible, and that, even if inadmissible, the improper reception of evidence to explain a written contract being ground for a new trial only when it leads to misdirection, which was not complained of, the defendants could not now urge it.

Held, also, if the judge did not charge as strongly in defendants' favour as it was thought he ought to have done, the proper form of objection would have been for non-direction, which, however, was only ground for granting a new trial when the verdict was against the weight of evidence, which did not appear in this case; nor that the damages recovered by plaintiff

were, under the circumstances of the case, excessive. — *Spring v. Cockburn et al.*, 63.

VERDICT BY MISTAKE.

Affidavits by jurors—Estoppel in pais—Misdirection—County court appeal—Exhibits produced on appeal—New trial.

The jury, having agreed to render a sealed verdict, handed a letter under seal to the constable for delivery to the judge, to whom it was taken at his residence. Upon opening and reading the enclosure, the judge sent back a written memorandum that it would not do, and that they must find for either plaintiff or defendant. The jury then asked the constable which of the parties was plaintiff, and upon the sheriff being communicated with by the constable, he wrote upon a piece of paper that Thompson, the defendant, was plaintiff, and one Wilmot defendant. This paper he took to the jury, and at the same time told them that Thompson was plaintiff, when a number of them said they would find for Thompson. Shortly afterwards a sealed letter was handed to the constable, to be delivered to the judge, stating that they found for the plaintiff. The constable swore that he believed they intended to give a verdict for Thompson, and the latter's attorney also swore, and was uncontradicted, that the first sealed letter stated that the deeds, upon which the plaintiff (Morse) rested his claim, were void :

Held, reversing the judgment of the county court, that the verdict could not stand, and a new trial was, therefore, ordered in the court below.

Quere, whether affidavits by the

jury as to their mistake ought to have been received in the court below.

The execution of the defendant in the issue (the execution plaintiff) being in the sheriff's hands, the father of the execution debtor claimed the goods, whereupon the sheriff was directed by the attorney of the defendant to withdraw, which he did. The plaintiff (the claimant in the issue) subsequently placed an execution in the sheriff's hands against both father and son, when the former gave him a mortgage on the goods, which the son had assigned to him, and the plaintiff thereupon withdrew his writ, and several months afterwards the sheriff again seized under defendant's writ. There was no evidence that defendant knowingly either did or said anything to induce plaintiff to alter his position. The jury were told that if defendant abandoned the seizure, and in consequence plaintiff withdrew his writ and took the mortgage, defendant was estopped from disputing the validity of the mortgage:

Held, a misdirection, and that there was no estoppel.

Where exhibits used in the court below are not produced before the appellate court, the appeal will not be heard, if the attention of the court be called to the fact.—*Morse v. Thompson*, 94.

By consent, in county court case, &c.—See APPEAL.

WAREHOUSE RECEIPTS.

1. Where two partners, not carrying on the business of warehousemen, have their partnership stock in their own cellar, a receipt given by one to the other for that stock, though in the form of a

warehouse receipt, is not a warehouse receipt within the meaning of the Statute (ch. 54 Consolidated Statutes of Canada.—*Ontario Bank v. Newton*, 258.

2. *Con. Stat. C. ch. 54, secs. 8, 9*—24 *Vic. ch. 23, sec. 1*.

M. & Co. being indebted to the plaintiffs on certain overdue notes, it was agreed that plaintiffs should discount a further note for them, with the proceeds of which, it was understood, the overdue paper should be retired; that M. & Co. should hand over to the plaintiffs certain warehouse receipts for wool, stored in their warehouse, as collateral security. This note was accordingly, on 23rd January, 1868, discounted by plaintiffs, and the old notes duly retired, an agreement being signed by M. & Co. at the time of the discount, reciting that they had endorsed over the receipts as collateral security for the note, &c., &c. The receipts, nearly all in the same form, were as follows:

"WAREHOUSE RECEIPT.

"Received in store in our warehouse, at * * * from sundry parties, 17,900 pounds batting, to be delivered pursuant to the order of the Bank of British North America, to be endorsed hereon. The said batting is separate from, &c., &c." Neither M. & Co. nor the Bank endorsed the receipts:

Held, that they were not warehouse receipts under the statutes referred to, and that the Bank could not, therefore, claim the property covered by them.

Per *Hagarty*, C. J., that the transaction of the 23rd January, was not, in substance, though in form, a present advance to M. & Co., but merely a mode adopted of

paying off an already existing debt.—*Bank of British North America v. Clarkson, Assignee of Miller*, 182.

WARRANT.

Of commitment under seal of county court or signature of chairman of quarter sessions unnecessary.—See QUARTER SESSIONS.

WATER COURSE.

Natural water course—Evidence—C. S. U. C., ch. 57.

Held, that the evidence given in this case and set out below failed to establish a natural water course, and that the plaintiff's only remedy was under C. S. U. C. ch. 57.—*Murray v. Dawson*, 314.

WAY-GOING CROPS.

See TROVER.

WEIGHT OF EVIDENCE.

See VERBAL EVIDENCE.

WITNESSES AND EVIDENCE.

Administrator durante minori etate—C. S. U. C. c. 32, s. 5—Widow of deceased competent witness.

In an action by the administrator of the husband *duranti minori etate* of the widow, *Held*, that the latter was not an admissible witness under C. S. U. C. ch. 32, sec. 5, as one in whose "immediate or individual behalf" the action was brought.—*Goold v. Smith*. 127.

See COMMISSION TO EXAMINE WITNESSES.

WORK AND LABOR.

See DEBITATUS ASSUMPSIT.

WRITTEN CONTRACT.

Under a written contract, entered into between plaintiff and defendant, plaintiff agreed to deliver to defendant 60,000 merchantable oil barrel staves, *subject to the culling of one S.*, and defendant was to pay for the staves at a rate named. Plaintiff sued defendant on this contract, basing his right to recover upon the delivery by him under the contract of the staves, which he alleged to have been duly culled by S. Defendant pleaded (as the court intended the plea) that plaintiff did not deliver to defendant, nor did defendant accept from plaintiff, *staves which had been culled by S.*, to any greater extent than 52,479, to which amount payment was pleaded; but at the trial he rested his case, as to the residue of the staves, claimed by plaintiff to have been delivered, solely upon the fact that these latter were not merchantable staves, although they had been approved by S:

Held, affirming the judgment of the county court, that the culling of S. must be taken as conclusive between the parties under the contract, and that it was not competent for defendant, upon the issue joined, to raise any questions as to the quality of the staves after approval by S.—*DeCew v. Clark*, 155.

2. *Sale of goods—Written Contract—Construction—Evidence—Variance—Statute of Frauds—Default in payment—Right to recover back deposit.*

Plaintiff sued defendants, charging in the first count of his declaration that defendants sold and plaintiffs bought 14,000 bushels of barley at a certain price, to be delivered to plaintiff, when

called for, on board a certain vessel, to be paid for by plaintiff on getting receipt; that plaintiff then paid defendants \$200 on account and called for delivery, assigning, as a breach, the non-delivery of the barley. The evidence of the contract consisted of a writing purporting to be a receipt, dated 29th September, 1865, signed by defendants, for \$200, which was therein stated to have been paid "as part margin" on a cargo of barley sold by defendants to plaintiff, to be delivered when called for, and to be paid for on getting the receipt of the captain of the vessel; and also another writing signed by both parties at the same time, but before the receipt was signed, and also bearing the same date, and being a memorandum of the sale of the barley in question, from which it appeared that the barley was to be delivered *on the following Thursday*, that the "margin" to be paid was \$1000, and that the residue (\$800) was to be paid by plaintiff on the same day that the \$200 was paid:

Held, that the two writings must

be read as incorporated, the one with the other, and that the true contract was to be deduced from reading both together, that the jury should have been so directed, and that plaintiff having failed to pay the \$800, balance of margin, on the day named, could not recover under the above count.

Held, also, that there was no substantial variance, for that reading the two together, the words, "to be delivered when called for," as contained in the second writing, might well mean within the time that had just been fixed by the first.

Per Gwynne, J., that the allegation of the payment of the two hundred dollars brought the case within the exceptions of the 17th section of the Statute of Frauds.

Quere, as to the right of plaintiff to recover back the two hundred dollars paid on account.—*Phippen v. Hyland, et al.* 416.

WRITTEN CONTRACT.

Verbal evidence to explain.—

See VERBAL EVIDENCE.

ERRATA.

At page 82, in lieu of "Freeman" read *McKelcan*, and on the 4th line above that in lieu of "Hill" read *her*.

At page 86, in lieu of "imperative" read *inoperative*.





